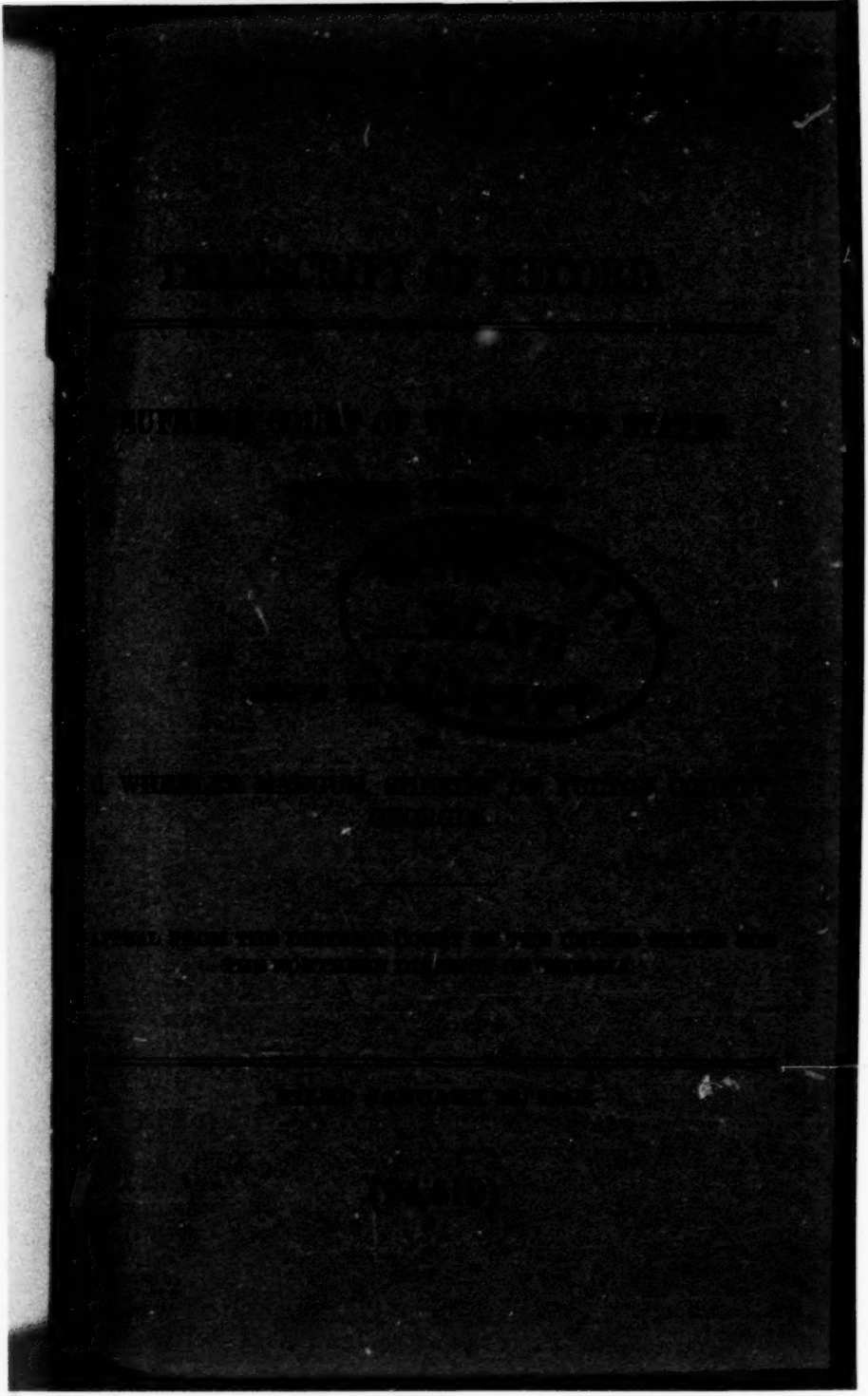

(24,519)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT,

vs.

C. WHEELER MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

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a In the District Court of the United States for the Northern District of Georgia.

LEO M. FRANK
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

To the Honorable the District Court of the United States in and for the Northern District of Georgia:

The petition of Leo M. Frank respectfully shows:

First. I am and ever since my birth have been a citizen of the United States. I am now and for some years past have been a resident of Fulton County, in the State of Georgia, I am unjustly and unlawfully deprived of my liberty, and unlawfully imprisoned, confined and detained in the jail of said County, by C. Wheeler Mangum, the Sheriff of said County and Ex-Officio jailer.

Second. My aforesaid imprisonment, confinement and detention are wholly without the authority of and contrary to the law, and in violation of my rights as a citizen of the United States as guaranteed by the Constitution of the United States, and particularly by Section 1 of the Fourteenth Amendment to said Constitution, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to him the equal protection of the laws, the protection of which I expressly invoke.

Third. The sole claim of authority by virtue of which the said C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, so restrains and detains me is, that on May 24, 1913, I was indicted by the Grand Jury of Fulton County, State of Georgia, on the charge of having murdered Mary Phagan; that thereafter, in
b the Superior Court of Fulton County aforesaid, Hon. L. S. Roan, a Judge of said Court, presiding, I was arrainged and tried on said indictment, and on August 25, 1913, the jury empaneled to try the said indictment returned a verdict of guilty against me, upon which verdict the judgment of the Court was thereafter rendered, and I was, on August 26, 1913, sentenced to death. A copy of said judgment and of the subsequent order extending the time for the execution thereof is hereto annexed, marked Exhibit A. I was thereupon remanded to the custody of said C. Wheeler Mangum, Sheriff and ex-officio jailer aforesaid, which said custody has continued until the present time.

Fourth. At the time of the rendition of said verdict, the entry of said judgment and the pronouncement of the sentence of death, the said Superior Court of Fulton County, in which I was tried, had lost jurisdiction over me, and over the trial of the said indictment; and all proceedings upon said trial, including the reception of the verdict, the rendition of judgment and the pronouncement of sentence of death, and my com-mitment to the jail of Fulton County aforesaid and into the custody of the said C. Wheeler Mangum,

Sheriff and ex-officio jailer of said County, were without due process of law and in all respects null, void and of no effect, and my imprisonment, confinement and detention as aforesaid, were in all respects illegal and in violation of my aforesaid constitutional rights.

Fifth. The facts which occasioned such loss of jurisdiction, and by reason of which I was deprived of due process of law and the equal protection of the laws, are as follows:

My trial in the Superior Court of Fulton County, State of Georgia, before Hon. L. S. Roan and a jury, began on July 28, 1913, in the Court House at Atlanta, Georgia, and continued until August 25, 1913. The court room in which the trial took place was on the ground floor of the Court House. The windows of the court room were open during the progress of the trial, and looked out on Pryor Street, a public street of Atlanta. An open alley ran from Pryor Street along the side of the Court House, and there
c were windows looking into this alley from the court room. The noises from the street were thus conveyed to the court room, and the proceedings in the court room could be heard in the street and alley. Considerable public excitement prevailed during the trial, and it was apparent to the Court that public sentiment seemed to be greatly against me. The court room was constantly crowded, and considerable crowds gathered in the street and alley, and the noises which emanated from them could be heard in the court room. These crowds were boisterous. Several times during the trial, the crowd in the court room and outside of the Court House applauded, in a manner audible both to the Court and jury, whenever the State scored a point. The crowds outside cheered, shouted and hurrahed, while the crowd within the court room evidenced its feelings by applause and other demonstrations. Practically all of the seats in the court room were occupied, both within and without the bar. The aisles at each end of the court room were packed with spectators. The jury, in going to and from the court room, in the morning, at noon and in the evening, were dependent upon the passageways made for them by the officers of the court. The bar of the court room itself was so crowded as to leave but a small space for occupancy by the counsel. The jury box, which was occupied by the jury, was enclosed by the crowd sitting and standing in such close proximity to it that the whispers of the crowd could be heard during a part of the trial.

On Saturday, August 23, 1913, during the argument of Solicitor General Dorsey to the jury, Reuben R. Arnold, Esq., one of my counsel, made an objection to such argument, and the crowd laughed at him. While Mr. Arnold, my counsel, made a motion for a mistrial, and was engaged in taking evidence in support thereof before the Court, the crowd applauded a witness who testified that he did not believe that the jury heard the applause of the crowd on the previous day, as at that time the jury was in the jury room about twenty feet distant.

On Saturday, August 23, 1913, while the Court was con-
d sidering whether or not the trial should proceed on that evening and to what hour the trial should be extended, the ex-

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citement in and without the court room was so apparent as to cause apprehension in the mind of the Court as to whether the trial could be safely continued on that day, and before deciding upon an adjournment, the presiding Judge, Hon. L. S. Roan, while upon the bench, and in the presence of the jury, conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, who were well known to the jury. The public press of Atlanta, apprehending danger if the trial continued on that day, united in a request to the Court, that the proceedings should not continue on Saturday evening. The trial was thereupon continued until the morning of Monday, August 25, 1913.

It was evident on that morning, that the public excitement had not subsided, and that it was as intense, as it had been on the Saturday previous. Excited crowds were present as before, both within and outside of the court room. When the Solicitor General entered the court room, he was greeted by applause by the large crowd present, who stamped their feet and clapped their hands, the jury being then in its room, about twenty feet distant.

During the entire trial I was in the custody of C. Wheeler Mangum, the Sheriff of Fulton County and ex-officio jailer, and was actually incarcerated in said jail, except on such occasions when I was brought into the court room by the Sheriff or one of his deputies. I was unable to be present at the trial, except when permitted by the Court and conducted there by the said Sheriff or his deputies.

On the morning of Monday, August 25, 1913, shortly before Hon. L. S. Roan, Presiding Judge, began his charge to the jury, he privately conversed with Messrs. L. Z. Rosser and Reuben R. Arnold, two of my counsel, in the jury room of the Court House, and referred to the probable danger of violence that I would incur if I were present when the verdict was rendered and the verdict should be one of acquittal or of disagreement. After he had thus expressed himself, he requested my counsel to agree that I need not be present at the time when the verdict was rendered and the jury polled. In the same conversation the Judge expressed his opinion to counsel, that even they might be in danger of violence should they be present at the reception of the verdict. Under these circumstances they agreed with the Judge, that neither I nor they should be present at the rendition of the verdict.

I knew nothing of this conversation, nor of any agreement made by my said counsel with the Judge, until after the rendition of the verdict and sentence of death had been pronounced.

Pursuant to this conversation, I was not brought into court at the time of the rendition of the verdict, and I was not present when the verdict was received and the jury was discharged, nor was any of my counsel present when the verdict was received and the jury discharged.

I did not give to my counsel nor to any one else, authority to waive my right to be present at the reception of the verdict, or to agree that I should not be present at that time, nor were they in any way authorized or empowered to waive my right so to be present;

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nor did I authorize my counsel, or any of them, to be absent from the court room at the reception of the verdict, or to agree that they or any of them might be absent at that time. My counsel were induced to make the aforesaid agreement as to my absence and their absence at the reception of the verdict, solely because of the statement made to them by the Presiding Judge, and their belief that if I were present at the time of the reception of the verdict and it should be one of acquittal or of disagreement, it might subject me and them to serious bodily harm, and even to the loss of life.

Besides Messrs. Rosser and Arnold, I had as counsel Morris Brandon, Esq. and Herbert J. Haas, Esq. Neither of them was present when the verdict was received and the jury discharged.

f Neither the conversation with Judge Roan, nor the purport thereof, was communicated to Messrs. Brandon and Haas, nor did they have any knowledge thereof, until after sentence of death had been pronounced against me.

After the jury had been finally charged by the Court and the case had been submitted to it, when Mr. Dorsey, the Solicitor General, left the court room, a large crowd on the outside of the Court House and in the streets, greeted him with loud and boisterous applause, clapping their hands and yelling "Hurrah for Dorsey," placed him upon their shoulders, and carried him across the street into a building where his office was located. The crowd did not wholly disperse during the interval between the submission of the case to the jury and the return of the jury to the court room with its verdict, but during the entire period a large crowd was gathered in the immediate vicinity of the Court House. When it was announced that the jury had agreed upon a verdict, a signal was given from within the court room to the crowd on the outside to that effect, and the crowd outside raised a mighty shout of approval, and cheered while the polling of the jury proceeded. Before more than one juror had been polled, the applause was so loud and the noise was so great, that the further polling of the jury had to be stopped, so that order might be restored, and the noise and cheering from without was such, that it was difficult for the Presiding Judge to hear the responses of the jurors as they were being polled, although he was only ten feet distant from the jury.

All of this occurred during my involuntary absence from the court room, I being at the time in the custody of the Sheriff of Fulton County and incarcerated in the jail of said County, my absence from the court room, and that of my counsel, having been requested by the Court because of the fear of the Court that violence might be done to me and my counsel had I or my said counsel been in court at the time of the rendition of the verdict.

Sixth. Thereafter, on August 26, 1913, I was sentenced

g to death by said Superior Court of Fulton County, Georgia, and remanded to the custody of C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, said Court being at that time without jurisdiction over me or over the cause in which said verdict was rendered, because of my involuntary absence from the court at the time of the rendition of the verdict and of the polling and

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discharge of the jury, said trial having thereby become a nullity and the proceedings of Hon. L. S. Roan, Presiding Judge, in receiving said verdict and polling the jury and discharging it, being coram non judice and devoid of due process of law.

Seventh. On August 26, 1913, my counsel filed a motion for a new trial. This was denied on October 31, 1913, Hon. L. S. Roan, the presiding Judge, in denying the motion saying, that the jury had found me guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of my guilt; that with all the thought he had put on the case, he was not fully convinced that I was innocent or guilty, but that he did not have to be convinced; that there was no room to doubt that the jury was, and that he felt it his duty to order that the motion for a new trial be overruled. On account of the great length of the motion for new trial, a copy is not attached, but a copy thereof is exhibited herewith to the Court.

Eighth. The cause was then taken on writ of error to the Supreme Court of Georgia, where, on February 17, 1914, a judgment was rendered affirming the judgment of conviction of the Superior Court of Fulton County, and denying my motion for a new trial. The opinion of the Supreme Court of Georgia is reported in Volume 141 Georgia, page 243 and the same is hereby referred to.

Ninth. On April 16, 1914, I filed my motion in the Superior Court of Fulton County, Georgia, to set aside the verdict rendered against me, on the grounds set forth in paragraphs Four, Fifth and Sixth of this petition, to wit, that I was involuntarily absent from court when the verdict against me was received and the jury discharged, in violation of my aforesaid constitutional rights; that I was deprived of a fair and impartial trial, of due process of law, and of the equal protection of the laws; that I did not waive the right to be present at the reception of the verdict, and did not authorize the waiver of such right on my behalf by my counsel, or any other person, nor consent that I should not be present at the rendition of the verdict, or that my counsel should be absent at that time; that any agreement made by my said counsel in my absence, and without my knowledge or consent that I should not be present at the rendition of the verdict, was of no legal force or effect, and that by reason of the premises the verdict rendered against me was a nullity.

Tenth. The State of Georgia, by the Solicitor General, demurred to this petition, and on June 6, 1914, it was dismissed on said demurrer, and judgment was rendered against me thereon.

Eleventh. The judgment was then taken by writ of error to the Supreme Court of Georgia, where, on November 14, 1914, a judgment was rendered by said Court which affirmed the judgment of the Superior Court of Fulton County sustaining the State's demurrer to my petition and dismissing my motion to set aside said verdict. The grounds of the judgment of the Supreme Court of Georgia were, in substance, (1) that a person accused of crime has the right to be present at the time of the rendition of the verdict

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against him, but such right is an incident of the trial; (2) that his absence at the time of the rendition of the verdict is a mere irregularity that can be waived by him; (3) that under the laws of Georgia a motion for a new trial is an available remedy by which to attack a verdict rendered in the absence of one accused of crime, and (4) that after the making of a motion for a new trial and the affirmance of judgment denying the same by the Supreme Court, a motion made thereafter to set aside the verdict on the ground that the accused had been absent from the court room when
i the verdict was rendered, is too late. The opinion of the Supreme Court of Georgia is of great length and is, therefore, not hereto attached, but a copy thereof is herewith exhibited to the Court.

Twelfth. Under previous decisions of the Supreme Court of Georgia, and under the practice which had prevailed throughout the State prior to the aforesaid decision rendered in my case on November 14, 1914, as aforesaid, the proper procedure to attack as a nullity a verdict rendered in the absence of a prisoner, had been held to be a motion to set aside the verdict. A motion for a new trial was treated as not being the proper remedy.

Thirteenth. Such former decisions of the Supreme Court of Georgia were unanimous decisions, and under the laws of the State of Georgia had the force of a statute until reversed by a full bench, after argument, on a request for review granted by the Court.

Fourteenth. No previous decision of the Supreme Court of Georgia, nor the Court of Appeals of said State, said courts being its only appellate courts and its highest courts, had ever declared that a motion to set aside as a nullity a verdict rendered in a prisoner's absence, was not an available remedy to attack such verdict. The decision of the Supreme Court of Georgia in my case, which determined that a motion for a new trial was an available remedy in such a case and denied my right to move to set aside the verdict on the aforesaid grounds, was the first decision of its kind ever rendered by said Court or by the Court of Appeals of Georgia.

Fifteenth. The said decision had the effect of depriving me of a substantial right given to me by the law in force at the time to which my alleged guilt related, and at the time of the reception of the verdict against me and of the presentation and decision
j of the motion for a new trial, and took from me a right which at all of said times was vital to the protection of my life and liberty, and constituted the passing of an ex post facto law, in violation of the prohibition contained in Article 1, Section 10, of the Constitution of the United States, and was illegal and void.

Sixteenth. The said judgment of the Supreme Court of Georgia, rendered on November 14, 1914, likewise deprived me of due process of law, and of the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States, because the Court thereby, in effect, declared that, in order to avail myself of my aforesaid constitutional rights, to wit, the assertion of my right to due process of law and to the equal pro-

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tection of the laws, I would be compelled to subject myself to a second jeopardy, thus depriving me of my aforesaid constitutional rights, except on the illegal condition of the surrender by me of the right secured to all persons charged with criminal offenses in the State of Georgia, by paragraph 8, Section 1*f*, Article I, of the Constitution of said State, that no person shall be put in jeopardy of life or liberty more than once for the same offense; save on his or her own motion for a new trial after conviction or in case of mistrial.

Seventeenth. On November 18, 1914, I applied to the Supreme Court of Georgia for a writ of error to the Supreme Court of the United States, for a review of the aforesaid judgment denying my motion to set aside the verdict rendered against me, and said application was, on November 18, 1914, denied.

Eighteenth. On November 21, 1914, I made an application to Mr. Justice Lamar, the Justice of the Supreme Court of the United States assigned to the Fifth Circuit, which includes the State of Georgia, for a writ of error to review said judgment. This application was denied on November 23, 1914. A similar application was made to Mr. Justice Holmes of the Supreme Court of the United States, who denied the same on November 25, 1914, and an application having thereafter been made to Mr. Chief Justice White of said Court, the same was referred to the full bench of the Court, which, on December 7, 1914, denied the same, without opinion.

Nineteenth. The denial by Mr. Justice Lamar and Mr. Justice Holmes of said application for a writ of error, proceeded on the ground that, inasmuch as the decision of the Supreme Court of Georgia, that under the laws of that State, where a motion for a new trial has been made and denied, a defendant cannot make a motion to set aside the verdict on a ground known to him when his motion for new trial was made, that he was not present when it was returned, involves a matter of State practice, the case was not presented in such form as permitted it to be reviewed on writ of error by the Supreme Court of the United States. The memoranda by Mr. Justice Lamar and Mr. Justice Holmes denying the application for writ of error are hereto attached marked Exhibit B.

Twentieth. Having thus exhausted all of my remedies in the courts of the State of Georgia, and by applications for writ of error to the Supreme Court of the United States, to review the judgment denying my motion to set aside the verdict rendered against me as aforesaid, and having been afforded, as above appears, no adequate and efficient means for asserting and obtaining my rights under the Constitution of the United States, I now ask this Honorable Court to discharge me from custody, because of the nullity of said verdict and of the judgment rendered thereon and my commitment thereunder, for the reasons hereinbefore set forth, and in substantiation thereof, and of my contention that the Superior Court of Fulton County, State of Georgia, wherein I was convicted of the crime of murder, lost jurisdiction over me, as hereinbefore set forth, I aver:

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(1) The reception, in my absence, of the verdict convicting me of the crime of murder, tended to deprive me of my life and liberty without due process of law, within the meaning of the Four-
l teenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

(2) I had the right to be present at every stage of my trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

(3) My involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived me of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

(4) This opportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

(5) My right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither I nor my counsel could waive or abjure.

(6) My counsel having had no express or implied authority from me to waive my presence at the time of the rendition of the verdict, and it being in any event beyond my constitutional power to give them such authority, their consent to the reception of the verdict in my absence was a nullity.

(7) Since neither I nor my counsel could expressly waive my right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by me or acquiescence on my part in any action taken by my counsel.

(8) My involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the failure to raise the jurisdictional question on my motion for a new trial, did not deprive me of my constitutional right to attack as a nullity the verdict rendered against me and the judgment based thereon.

(9) My trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, be-
m cause dominated by a mob which was hostile to me, and whose conduct intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and for that reason also, I was deprived of due process of law and of the equal protection of the law, within the meaning of he Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

Twenty-first. No previous application for a writ of habeas corpus has been made by me.

Wherefore, I pray that a writ of habeas corpus may issue, directed to C. Wheeler Mangum, Sheriff of Fulton County, Georgia, ex-officio jailer, and to each and all of his deputies, requiring him and them to bring and have me before this Court, at a time to be by this Court

determined, together with the true cause of my detention, to the end that due inquiry may be had in the premises, and that I may be relieved from my said unlawful imprisonment and detention. And thus I will ever pray.

Dated, at Atlanta, Georgia, December 17th, 1914.

(Signed) LEO M. FRANK,
Petitioner.

(Signed) " TYE, PEEPLES AND JORDAN,
HENRY A. ALEXANDER,
Attorneys for Petitioner.

n

EXHIBIT A.

No. 9410.

THE STATE
vs.
LEO M. FRANK.

Indictment for Murder. Fulton Superior Court. May Term, August 25th, 1913; Verdict of Guilty, July Term, 1913.

Whereupon, it is considered, ordered and adjudged by the Court that the defendant, Leo M. Frank, be taken from the bar of this court to the common jail of the County of Fulton, and that he be safely there kept until his final execution in the manner fixed by law.

It is further ordered and adjudged by the Court that on the 10th day of October, 1913, the defendant, Leo M. Frank, shall be executed by the Sheriff of Fulton County in private, witnessed only by the executing officer, a sufficient guard, the relatives of such defendant and such clergymen and friends as he may desire; such execution to take place in the common jail of Fulton County, and that said defendant, on that day, between the hours of 10 o'clock A. M., and 2 o'clock P. M., be by the Sheriff of Fulton County hanged by the neck until he shall be dead, and may God have mercy on his soul.

In Open Court, this 26th day of August, 1913.

L. S. ROAN,
J. S. C. Mt. Ct. Presiding.

HUGH M. DORSEY,
Sol. Gen'l.

o Superior Court Fulton County, Ga.

No. 9410.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Murder.

Upon inquiry into the facts and circumstances of this case, it appearing that the defendant, Leo M. Frank, was on the 25th day of August, 1913, convicted of murder, and thereafter on the 26th day of August, 1913, was duly sentenced by an order of this Court to the punishment of death.

And it further appearing that said sentence has not been executed, having been superseded and stayed by a motion for a new trial and an appeal thereon to the Supreme Court of Georgia, which said Court affirmed the verdict and judgment of this Court, and an appropriate order having been passed on the 3rd day of March, 1914, making said judgment of affirmance by the Supreme Court the judgment of this Court.

And it appearing that the sentence heretofore imposed on said Leo M. Frank, still stands in full force and effect, and that no legal reason exists against the execution of said sentence.

It is here and now ordered and adjudged that the Sheriff of Fulton County, be, and he is, hereby commanded to do execution of such sentence aforesaid on the 17th day of April, 1914, in the manner and form designated in said sentence, and prescribed by law.

Let the petition and writ of habeas corpus and this order be entered on the minutes of this Court, this 7th day of March, 1914.

BEN. H. HILL.
Judge Superior Court Fulton County, Ga.

p Georgia, Fulton County, November Term, 1914.

THE STATE
vs.
LEO M. FRANK.

Indictment for Murder.

Verdict of Guilty.

Whereupon, it is considered, ordered and adjudged by the Court, that the Defendant, Leo M. Frank, be taken from the bar of this Court to the common jail of Fulton County, and be thereby safely kept until his final execution in the manner fixed by law.

It is further ordered and adjudged: that on the 22nd day of January, 1915, the defendant, Leo M. Frank, shall be executed by the

Sheriff of Fulton County, in private, witnessed only by the executing officer, a sufficient guard, the relatives of the said defendant, and such clergymen and friends as he may desire; such execution to take place in the common jail of Fulton County, and that said defendant, on that day, between the hours of 10 A. M. and 4 P. M., be by the Sheriff of Fulton County hanged by the neck until he shall be dead.

And may God have mercy on his soul.

In Open Court, this 9th day of December, 1914.

BENJ. H. HILL,
Judge S. C. A. C.

q UNITED STATES OF AMERICA,
Northern District of Georgia, County of Fulton, ss:

Leo M. Frank, being duly sworn, deposes and says, that he is the Petitioner named in the foregoing petition subscribed by him, that he has read the same and knows the contents thereof, and that the statements made therein by him are true, as he verily believes.

(Signed) LEO M. FRANK.

Subscribed and sworn to before me this 17th day of December, 1914.

[SEAL.] (Signed) MONTEFIORE SELIG,
Notary Public, Fulton County, Georgia.

r UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

To C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Greeting:

We command you, that the body of Leo M. Frank, in your custody detained, as it is said, together with the time and cause of his imprisonment and detention, you safely have before the District Court of the United States in and for the Northern District of Georgia, at the court room of said Court, at a Stated Term thereof, to be held on the — day of December, 1914, at — o'clock in the morning of that day, or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concerning the said Leo M. Frank: and have you then and there this writ.

Witness, Honorable William T. Newman, Judge of the District Court of the United States for the Northern District of Georgia, this — day of December, Nineteen hundred and fourteen.

Attest:

———— ————,
Clerk of the District Court of the United States for the Northern District of Georgia.

The foregoing writ is hereby allowed.

Dated, Atlanta, Ga., December —, 1914.

———— ————,
United States District Judge.

EXHIBIT "B."

Opinion of Mr. Justice Lamar.

LEO M. FRANK
v.
THE STATE OF GEORGIA.

Motion to Set Aside Verdict.

The Record discloses that on August 25, 1913, Frank was found guilty of murder by a jury in the Superior Court of Fulton County, Georgia, he, with the consent of his counsel, being absent from the court room when the verdict was rendered. At the same term he made a motion for a new trial in which the fact of his absence was mentioned, though it was not made a ground of the motion. A new trial was refused and the case taken to the Supreme Court of Georgia, where the judgment was affirmed.

Thereafter, on April 16, 1914, and at a subsequent term of the Superior Court, Frank made a "motion to set aside the verdict." The order denying the same was affirmed by the State Supreme Court and thereupon this application for a writ of error was made.

In its opinion in this case the Supreme Court of Georgia, among other things, held:

1. That under the due process clause of the Fourteenth Amendment to the Constitution of the United States, Frank was entitled to be present in court at every stage of the trial, including the time when the jury returned their verdict.
2. That under the laws of Georgia and the practice of its courts a motion for a new trial is a proper method by which to attack a verdict rendered in the prisoner's absence.
3. That when that method of procedure is adopted, the defendant must set out in the motion for a new trial all known grounds of objection to the verdict, including the fact that he was absent when it was rendered.
4. That having elected to make a motion for a new trial and the judgment denying the same having been affirmed by the Supreme Court, the defendant could not thereafter make a motion to set aside the verdict on the ground that he had been absent from the court room when the verdict was rendered.

The laws of the several States fix the method in which, and the time at which, to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the court room and the fact that the defendant was not present when the verdict was rendered. It is for the States to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict, or by a motion for a new trial, or both. The laws of the States also determine whether the denial of one of these motions will prevent the defendant

from subsequently making the other. The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That ruling involves a matter of State practice and presents no Federal question. The writ of error is therefore denied.

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

s EXHIBIT "B."

t *Opinion of Mr. Justice Holmes.*

FRANK
vs.
STATE OF GEORGIA.

Application for a Writ of Error.

I understand that I am to assume that the allegations of fact in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding Judge to be ready for violence unless a verdict of guilty was rendered. I should not feel prepared to deny a writ of error if I did not consider that I was bound by the decision of the Supreme Court of Georgia that the motion to set aside came too late, and even if I thought that the suggestion of waiver was not enough to meet the Constitutional question and the right to bring the case here. I understand from the headnote and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court and, as cases must be ended at some time, that apart from any question of waiver, the second motion came too late. I think I am bound by this decision even if it reverses a long line of cases and the Counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case. I have the impression that there is a case in which the ground that I rely on as showing want of due process of law was rejected by the Court with my dissent, but I have not interrupted discussion with Counsel to try to find it, if it exists.

O. W. HOLMES,
Justice Supreme Court of the United States.

u Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. No. 1156. Motion. Leo M. Frank against C. Wheeler Mangum, Sheriff of Fulton County, Georgia. Application for Writ of Habeas Corpus. Filed in Clerk's Office, Dec. 17th, 1914. (Signed) O. C. Fuller, Clerk. Tye, Peeples & Jordan, Henry A. Alexander, Attorneys for Leo M. Frank."

v *Opinion of the Court.*

In the District Court of the United States for the Northern District of Georgia.

LEO M. FRANK
vs.
C. WHEELER MANGUM, Sheriff Fulton Co.

It is well settled, and indeed the Act of Congress with reference to the issuance of writs of habeas corpus by this Court provides that the Court shall issue the writ "unless it appears from the petition that the party is not entitled thereto". So that, unless it appears from this application and from the exhibits attached thereto, and the records referred to therein that relief could be granted if the writ issued, the writ should be denied.

I do not think this petition, or application, and the exhibits and records referred to, make a case wherein this Court can properly allow the issuance of the writ. All of the papers presented show clearly that this defendant was tried in the Superior Court of the State and motion for a new trial was made and overruled, and the case was taken to the Supreme Court of the State, and the judgment of the lower court was affirmed. It further shows that afterwards a motion was made to set aside the verdict and that that motion was denied and it was then taken to the Supreme Court of the State and affirmed for the reasons stated in the opinion by the Supreme Court. It further shows that an application for a writ of error to the Supreme Court of the United States was made to Mr. Justice Lamar, and to Mr. Justice Holmes of the Supreme Court of the United States.

In a memorandum opinion filed by Mr. Justice Lamar in denying the application for writ of error, he said this, among other things:

"The laws of the several States fix a method in which, and a time at which, to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the court room and the fact that the defendant was not present when the verdict was rendered. It is for the State
w to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict, or by a motion for a new trial, or both. The laws of the State also determine whether the denial of one of these motions will prevent the defendant from subsequently making the other. The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That rule involves a matter of State practice and presents no Federal question. The writ of error is therefore denied."

Mr. Justice Holmes, speaking in his memorandum denying the application for the writ of error to the Supreme Court of the United States, from the last decision of the Supreme Court of Georgia, said:

"I understand from the headnote and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court and, as cases must be ended at some time, that apart from any question of waiver, the second motion came too late. I think I am bound by this decision even if it reverses a long line of cases and the Counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case."

Subsequently the matter was presented to Chief Justice White, who referred the matter, apparently, to the entire Court, and the motion for the writ of error was denied by the entire Court.

How this Court could be justified in issuing this writ when this record is disclosed to it, I am unable to see. If this writ should issue, notwithstanding all that has occurred, and this applicant should be brought into court, the only thing the Court here could do would be to hear evidence and determine whether this applicant had been denied the equal protection of the laws and due process of law, and consequently should be discharged. It seems to me that this would be the exercise by this Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the Laws of United States. Also the Court would be considering the matter as proper for hearing and decision here in the face of the decisions of two Justices of the Supreme Court—indeed of the entire Court—to the effect, as stated, that no Federal question remained for consideration or now exists in the case.

I am not aware of any precedent for such action in a case like this on the part of this Court, and none has been referred to by counsel for the applicant who have so ably presented and argued this case.

No question whatever is made about the jurisdiction of the Court trying the case originally and subsequently reviewing it on writ of error.

Believing from the petition itself, therefore, that the applicant is not entitled to the writ of habeas corpus or to the relief prayed, the application for the same is denied.

This 21st day of December, 1914.

(Signed) WM. T. NEWMAN,
U. S. Judge.

Endorsed on the cover is the following: "United States District Court Northern District of Georgia. No. —. Leo M. Frank vs. C. Wheeler Mangum, Sheriff, Fulton Co. Opinion of the Court. Filed in Clerk's Office 21st day of Dec. 1914. (Sgd.) O. C. Fuller, Clerk, By J. D. Steward, Deputy."

y In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

The petition of Leo M. Frank for a writ of habeas corpus to be directed to C. Wheeler Mangum, Sheriff and ex-officio jailer of Fulton County, Georgia, having been presented to the Court with the exhibits attached thereto, and there being also exhibited to the Court and considered by it a copy of the motion for new trial referred to therein, and a copy of the opinion of the Supreme Court of the State of Georgia referred to in Paragraph Eleven thereof, both of which exhibits have been identified by the Court and ordered filed, and the Court having fully considered the said petition and said exhibits and said copy of the motion for a new trial and of said opinion of the Supreme Court of Georgia, the Court finds that the facts alleged and shown are insufficient, under the law applicable thereto, to authorize the issuance of the writ; and the Court being of the opinion, from the allegations and facts stated in the petition and the exhibits and in said copy of the motion for new trial and of the opinion of the Supreme Court of Georgia, under the law applicable thereto, that if the writ be granted and a hearing given, the petitioner could not be discharged from custody, and no relief granted thereunder, and that petitioner is not entitled thereto;

It is ordered and adjudged by the Court that said petition for a writ of habeas corpus be, and the same is hereby, refused;

z to which ruling and refusal petitioner by his counsel excepts.

This 21st day of December, 1914.

(Signed) WM. T. NEWMAN,
Judge United States District Court
for the Northern District of Georgia.

Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. Leo M. Frank, Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Appellee. Order Denying Petition for Writ of Habeas Corpus. Filed Open Court, December 21, 1914. (Signed) O. C. Fuller, Clerk, by J. D. Steward, Deputy Clerk."

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aa In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

Assignments of Error on Petition for Writ of Habeas Corpus.

Now comes Leo M. Frank, the appellant in the above entitled cause, and avers and shows that, in the record and proceedings in the said cause, the District Court of the United States for the Northern District of Georgia erred to the grievous injury and wrong of the appellant in said cause and to the prejudice and against the rights of the appellant herein in the following particulars, to-wit:

First. The said District Court erred in denying the petition for writ of habeas corpus and in refusing to issue the same.

Second. The said District Court erred in denying the petition for writ of habeas corpus and in refusing to issue the same, on the ground that the Court was concluded and bound by the denial, in this case, of a writ of error from the Supreme Court of the United States to the Supreme Court of Georgia, by the Justices of the Supreme Court of the United States and by the said Court.

Third. The said District Court erred in refusing to hold that the verdict, the judgment and all subsequent proceedings in the trial of the indictment for murder against the appellant were, for the reasons alleged in the petition, coram non judice and void, and in refusing to issue the writ of habeas corpus as prayed.

bb Fourth. The said District Court erred in refusing to hold that the appellant, having exhausted his remedies in the State courts and by application for a writ of error from the Supreme Court of the United States, and having been unable to secure a ruling on the constitutional rights, privileges and immunities claimed by him, was entitled to the writ of habeas corpus as prayed.

Fifth. The said District Court erred in refusing to hold that the reception, in appellant's absence, of the verdict convicting him of the crime of murder, tended to deprive him of his life and liberty without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Sixth. The said District Court erred in refusing to hold that appellant had the right to be present at every stage of his trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

Seventh. The said District Court erred in refusing to hold that appellant's involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived him of the opportunity

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to be heard which constitutes an essential prerequisite to due process of law.

Eighth. The said District Court erred in refusing to hold that this oportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Ninth. The said District Court erred in refusing to hold that appellant's right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither appellant nor his counsel could waive or abjure.

Tenth. The said District Court erred in refusing to hold that appellant's counsel having had no express or implied authority
cc . from appellant to waive his presence at the time of the rendition of the verdict, and it being in any event beyond his constitutional power to give them such authority, their consent to the reception of the verdict in his absence was a nullity.

Eleventh. The said District Court erred in refusing to hold that since neither appellant nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by appellant or acquiescence on his part in any action taken by his counsel.

Twelfth. The said District Court erred in refusing to hold that appellant's involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the failure to raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon.

Thirteenth. The said District Court erred in refusing to hold that, because of the facts set out in the petition, appellant's trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to appellant, and whose conduct intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and for that reason also, appellant was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Fourteenth. The said District Court erred in holding that the appellant had been afforded due process of law under the Fourteenth Amendment to the Constitution of the United States.

dd Fifteenth: The said District Court erred in holding that the appellant had been accorded the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Sixteenth. The said District Court erred in holding that the reception, in appellant's absence, of the verdict, convicting him of the crime of murder, did not tend to deprive him of his life and liberty

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without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Seventeenth. The said District Court erred in holding that appellant did not have the right to be present at every stage of his trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

Eighteenth. The said District Court erred in holding that appellant's involuntary absence at the time of the reception of the verdict and the polling of the jury, did not deprive him of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

Nineteenth. The said District Court erred in holding that this opportunity to be heard, did not include the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Twentieth. The said District Court erred in holding that appellant's right to be present during the entire trial, including the time of the rendition of the verdict, was one which either appellant or his counsel could waive or abjure.

Twenty-first. The said District Court erred in holding that the consent of appellant's counsel to the reception of the verdict in his absence was not a nullity, because appellant's counsel had no express or implied authority to waive his presence at the time of the reception of the verdict, and it being in any event beyond appellant's constitutional power to give them such authority.

Twenty-second. The said District Court erred in holding that appellant's right to be present at the rendition of the verdict could be waived by implication or in consequence of appellant's pretended ratification or acquiescence on his part in the action taken by his counsel, because neither appellant nor his counsel could expressly or impliedly waive such right.

Twenty-third. The said District Court erred in holding that the failure to raise the jurisdictional question on appellant's motion for new trial deprived him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon, because appellant's involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, was incapable of being waived directly or indirectly, expressly or impliedly, before or after the rendition of the verdict.

Twenty-fourth. The said District Court erred in holding that, despite the facts set up in the petition, appellant's trial proceeded in accordance with the orderly processes of law essential to a fair and impartial trial, and that appellant was not deprived of due process of law and of the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States, even though appellant's trial was dominated by a mob which was hostile to him, and whose conduct intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions.

Twenty-fifth. The said District Court erred in refusing to hold

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that the Superior Court of Fulton County, Georgia had lost jurisdiction over appellant at and by reason of the reception of the verdict in his absence, and that the subsequent sentence imposed upon appellant and his subsequent detention thereunder was wholly
ff without authority of law and beyond the jurisdiction of the court.

And because of other errors appearing upon the face of the record.

Wherefore, for these and other manifest errors, said Leo M. Frank, appellant, prays that the judgment of the District Court of the United States for the Northern District of Georgia be reversed and set aside and held for naught and that the writ of habeas corpus prayed for be directed to issue.

(Signed) TYE, PEEPLES & JORDAN,
" H. A. ALEXANDER,
Attorneys at Law, for Appellant.

Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. Leo M. Frank, Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia. Assignments of error on appeal. Filed in Open Court December 21, 1914. (Sgd.) O. C. Fuller, Clerk, By J. D. Steward, Deputy Clerk.

gg In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

The above named appellant, Leo M. Frank, conceiving himself aggrieved by the judgment made and entered on the 21st day of December, 1914, by the United States District Court for the Northern District of Georgia, in the above entitled cause, does hereby appeal from said judgment to the Supreme Court of the United States, for the reasons specified in the assignments of error, which is filed herewith, appellant alleging that there exists probable cause for said appeal, and prays that this appeal may be allowed and that duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

(Signed) TYE, PEOPLES & JORDAN,
H. A. ALEXANDER,
Attorneys for the Appellant.

Endorsed on the cover is the following: "In the District Court of the United States for the Northern District of Georgia. Leo M.

Frank, Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Appellee. Petition for allowance of appeal. Filed in Open Court Dec. 21, 1914.

(Signed) O. C. FULLER, *Clerk,*
By J. D. STEWARD, *Deputy Clerk.*

gg In the District Court of the United States for the Northern District of Georgia, October Term, 1914.

Ex Parte Leo M. Frank.

Petition for Writ of Habeas Corpus.

The above styled petition having been presented to the Court and by order and judgment heretofore made, the prayer of the same for the issuance of the writ of habeas corpus having been denied, and the petitioner having filed his petition for the allowance of an appeal to the Supreme Court of the United States, together with an assignment of errors upon the said order and judgment;

The Court declines to grant the appeal prayed, accompanied by the certificate hereinafter referred to, upon the ground that having refused to grant even the issuance of the writ of habeas corpus because the Court was of the opinion that under the facts stated in the petition for the writ and the exhibits attached thereto and referred to therein and made a part of the same, and under the law applicable thereto, if the writ were granted and the hearing given the petitioner could not be discharged from custody, and no relief could be granted thereunder, and that the petitioner was not entitled to the writ, the Court could not, consistently therewith, make the certificate required by the Act of Congress of March 10, 1908, as necessary to the allowance of an appeal, to-wit: that there is probable cause for such allowance of appeal.

This 21st day of December, 1914.

(Signed) WM. T. NEWMAN,
U. S. Dist. Judge.

Endorsed on the cover is the following: "No. 1156. United States District Court, Northern District of Georgia, Northern Division. Leo M. Frank, versus C. Wheeler Mangum, Sheriff Fulton County, Georgia. Order filed in Clerk's Office 21 day of December, 1914. (Signed) O. C. Fuller, Clerk, By J. D. Steward, Deputy Clerk.

ii Copy of opinion Supreme Court of Georgia exhibited to and considered by me in Ex parte Leo M. Frank, petition for writ of habeas corpus. Let same be filed.

(Signed) WM. T. NEWMAN,
Judge U. S. Dist. Court,
Nor. Dist. of Ga.

Filed in Open Court December 21, 1914. (Signed) O. C. Fuller, Clerk, by J. D. Stewart, Deputy Clerk.

Opinion of the Supreme Court of the State of Georgia.

3, Criminal, October Term, 1914.

FRANK
v.
THE STATE.

By the COURT:

1. Due process of law implies the administration of laws which apply equally to all persons according to established rules, and which are "not violative of the fundamental priciples of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing."

(*a*) Consequently, where one indicted for murder has had full opportunity under the constitution and laws of the State to defend his case in the courts of the State having jurisdiction thereof, in person, by attorney, or both, according to established constitutional rules of procedure, he has been afforded due process of law under the State and Federal Constitutions, which provide that no person shall be deprived of life, liberty, or property without due process of law.

(*b*) And where such opportunity has been, under constitutional laws of the State, afforded without discrimination, he has been accorded the equal protection of the laws.

2. If on the trial of one indicted for murder a verdict of guilty is received in the absence of the prisoner, and without his consent, while he is incarcerated in jail, a motion for new trial is an available remedy in such case, if made in time.

(*a*) But where a motion for a new trial is made by the defendant, with knowledge of the fact that the verdict was rendered in his absence, and such motion does not contain that fact as a ground for new trial, though it is recited therein, it is too late after the motion for new trial has been denied and the judgment has been affirmed by this court, to make a motion to set aside the verdict on that ground.

3. It is the right of a defendant on trial for crime in this State to be present at every stage of his trial, and to be tried according to established procedure. But he may waive formal trial and verdict and plead guilty, and this includes the power to waive mere incidents of trial, such as his presence at the reception of the verdict.

(*a*) Accordingly, where on the trial of one accused of murder the counsel for the accused, at the suggestion of the trial judge, waived the presence of the defendant at the reception of the verdict, without his knowledge or consent, and where the verdict was received and the jury polled by the court when the defendant was not present, but was confined in jail, and the defendant's counsel were also absent; and where it appears that when the defendant was sentenced to suffer death he was present in court in person and by attorneys, and later, within the time allowed by law, made a motion for a new trial, which recited, among other things, his absence at the reception of the verdict and that his presence had been waived

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by his counsel, and his motion for new trial was refused by the trial court and its judgment affirmed by the Supreme Court, the defendant will be considered as having acquiesced in the waiver made by his counsel of his presence at the reception of the verdict, and he can not at a subsequent date set up such absence as a ground to set aside the verdict in a motion made for that purpose.

4. In so far as the motion to set aside the verdict relies on allegations of disorder within and without the court room, and popular excitement as affecting the trial, such matters peculiarly furnish grounds to be included in a motion for a new trial, under the practice in this State. In fact, contentions as to matters of that character were included in the original motion for a new trial,
kk and on examination as to the facts were ruled against the movant, and the judgment was affirmed by this court.

Leo M. Frank filed his motion in writing, which was afterwards amended, to set aside the verdict of guilty of murder rendered against him in the Superior Court of Fulton County. To this motion the State of Georgia interposed its demurrer, both general and special. On the hearing of the demurrer, and at the conclusion thereof, judgment was rendered by the court on June 6th, 1914, sustaining the demurrer upon each and every ground and dismissing the motion. To this judgment Leo M. Frank excepts and assigns the same as error.

From the motion it appears that the verdict of guilty of murder was received by the court on August 25, 1913, and it was sought to be set aside for the following reasons: At the time the verdict was received, and the jury trying the cause was discharged, the defendant was in the custody of the law and incarcerated in the common jail of the county. He was not present when the verdict was received and the jury discharged, as he had the right in law to be, and as the law required he should be. He did not waive the right to be present, nor did he authorize any one to waive it for him, nor consent that he should not be present. He did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and did not know of any waiver of his presence made by his counsel until after the sentence of death had been pronounced upon him. On the day the verdict was rendered, and shortly before the judge who presided at the trial of the cause began his charge to the jury, the judge in the jury room of the court house wherein the trial was proceeding privately conversed with two of the counsel of the defendant, and in the conversation referred to the probable danger of violence that the defendant would be in if he were present when the verdict was rendered if the verdict should be one of acquittal; and after the
ll judge had thus expressed himself, he requested the counsel thus spoken to to agree that the defendant need not be present at the time the verdict was rendered and the jury was polled. In these circumstances the counsel did agree with the judge that the defendant should not be present at the rendition of the verdict. In the same conversation the judge expressed the opinion also to the counsel that even counsel of the defendant might be in danger if

TO CLOSE IN CENTER

they should be present at the reception of the verdict. In these circumstances defendant's counsel, Rosser and Arnold, did agree with the judge that the defendant should not be present at the rendition of the verdict. The defendant was not present at the conversation and knew nothing about any agreement made, as above stated, until after the verdict was received and the jury was discharged and until after sentence of death was pronounced upon him. Pursuant to the conversation above stated, neither of defendant's counsel *were* present when the verdict was received and the jury discharged; nor was the defendant present when the verdict was rendered and the jury discharge-. Defendant says he did not give counsel, nor anyone else, any authority to waive or renounce the right of the defendant to be present at the reception of the verdict or to agree that the defendant should not be present thereat; that the relation of client and attorney did not give them such authority, though counsel acted in the most perfect good faith and in the interest of the personal safety of the defendant. Defendant did not agree that his counsel, or either them, might be absent when the verdict was rendered.

Defendant says upon and because of each of the grounds above stated, the verdict was of no legal effect and was void, and in violation of art. 1, sec. 1, par. 3 of the constitution of the State of Georgia, which provides that "no person shall be deprived of life, liberty or property, except by due process of law." That the reception of the verdict in the "involuntary absence of the defendant" was in *mm* violation of and contrary to the provisions of art. 6, sec. 18, par. 1 of the constitution of the State of Georgia, which provides that "the right of trial by jury, except where it is otherwise provided in the constitution, shall remain inviolate. That the reception of the verdict in the absence of the defendant was contrary to and in violation of the provisions of the Fourteenth Amendment to the constitution of the United States, to wit: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." That the reception of the verdict in the absence of the defendant was in violation of art. 1, sec. 1, par. 5 of the constitution of the State of Georgia, to wit: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel." Because the trial judge (Hon. L. S. Roan), upon considering "the motion for a new trial made by this defendant, after the reception of said verdict, as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty; that he, the said judge, had thought about the cause more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it his duty to order that the motion for a new trial be overruled." That the judge in denying to the defendant a new trial in the case, did not, as shown

by his statement, give to the defendant the judicial determination of the motion to which the defendant was entitled by law; that the judge being constituted by law as one of the triors did not afford to the defendant the protection which the law guarantees, nor the due process of law. It was alleged that the defendant was denied the due proces of law and the equal protection of the laws
nn because the court room wherein his trial was had had a number of windows on the Pryor Street side, looking out on the public street of Atlanta, and furnishing easy access to any noises that might occur upon the street; that there is an open alley way running from Pryor Street on the side of the court house, and there are windows looking out from the court room into this alley, and that crowds collected therein, and any noises in this alley could be heard in the court room; that these crowds were boisterous, and that on the last day of the trial after the case had been submitted to the jury, a large and boisterous crowd of several hundred people were standing in the street in front of the court house, and as the solicitor general came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict; that several times during the trial the crowd in the court room, and outside of the court room, which was audible both to the court and the jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting and hurrahing, and the crowd in the court room signifying their feelings by applause and other demonstrations, and on the trial, and in the presence of the jury, the trial judge in open court conferred with the chief of police of the city of Atlanta and the colonel of the Fifth Georgia Regiment stationed in Atlanta, which had the natural effect of intimidating the jury, and so influencing them as to make impossible a fair and impartial consideration of defendant's case; indeed, such determinations finally actuated the court in making the request of defendant's counsel, Messrs. Rosser and Arnold, to have the defendant and the counsel themselves to be absent at the time the verdict was received in open court, because the judge apprehended violence to the defendant and his counsel; and the appre-
oo hension of such violence naturally saturated the minds of the jury so as to deprive the defendant of a fair and impartial consideration of his case, which the constitution of the United States, in the Fourteenth Amendment hereinbefore referred to, entitled him to. On Saturday, August 23rd, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the court adjourned from Saturday twelve o'clock M. to Monday morning because it felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not subsided, and was as intense as it was on Saturday previous. When it was announced that the jury had reached a verdict, the trial

judge went to the court room and found it crowded with spectators and fearing violence in the court room, the trial judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and the confusion so great that the further polling of the jury had to be stopped so as to restore order, and so great was the noise and the confusion and cheering and confusion from without, that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury. All of this occurred during the involuntary absence of the defendant, he being at the time confined in jail as above set forth. Wherefore, etc.

The State of Georgia, responding to the motion to set aside the verdict, said by way of demurrer that the motion should be dismissed for the following reasons: (1) Because a motion to set aside a verdict or judgment of the court should be under the law *pp* predicated upon some defect appearing on the face of the pleadings or record, and the motion filed is not one predicated upon any defect appearing on the face of the pleadings or the record. (2) Because it affirmatively appears from the motion that the defendant, Leo M. Frank, made a motion for a new trial, which was denied by the court, and as a matter of law if the verdict was rendered at a time when the defendant was not present in court, such irregularity should have been included among the grounds of the motion for a new trial, and as a matter of law is conclusively presumed to have been incorporated and embodied in the motion for a new trial, which motion was heard and denied as shown by the petition. (3) Because the motion shows a course of conduct on the part of the defendant which amounts to an estoppel. And that the motion and the record of the decision of the case of Leo. M. Frank against the State, rendered by the Supreme Court of Georgia, affirmatively shows a course of conduct that amounts to and tutes an estoppel. (4) Because the motion affirmatively discloses that counsel for the defendant agreed with the court that the defendant should not be present at the rendition of the verdict; that this agreement on the part of counsel was and is binding on the defendant, Leo M. Frank, and effectively constitutes a waiver. (5) Because the motion, in conjunction with the decision of the Supreme Court of Georgia in the case of Leo M. Frank against the State of Georgia, affirmatively shows that Frank, after a knowledge of this waiver on the part of his counsel, acquiesced in the same and took steps affirmatively indicating a waiver of such conduct on the part of his counsel. (6) Because the motion affirmatively shows that the jury returning the verdict were polled, and the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury. (7) Because the motion and the decision of the Supreme Court of Georgia in the case above named affirma-

tively discloses that the verdict of guilty was received in open
qq court and a poll of the jury demanded on behalf of the defendant, and that the poll of the jury was in conformity with every requirement of law.

HILL, *J.* (after stating the foregoing facts):

1. Did the absence of the defendant, under the foregoing statement of facts, at the time that the verdict finding him guilty of murder was received by the court and the jury trying him was discharged, render the verdict void and of no legal effect? It is insisted by the defendant that the reception of the verdict in his involuntary absence, while he was confined in jail was in violation of the due process clauses of the State and Federal constitutions, and that it denied him the equal protection of the laws. "Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertible with the older expression 'the law of the land.' The basis of due process, orderly proceedings, and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the state of uncontrolled vengeance." McGehee on Due Process of Law, 1, citing Chicago, etc., R. Co. v. Chicago, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. ed. 979). On page 35, this same author says: "Before the passage of the Fourteenth Amendment the security of the citizens of the several States for due process of law in proceedings by the State lay in its institutions alone. Even if due process was denied, the Federal government had no right to interfere. The fourteenth Amendment changed this condition of affairs. It made it a matter of national concern that the State should not deny due process of law to its citizens and to others. It gave to the United States the right
rr to supervise the performance of this duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty and property. But under the amendment the authority of the Federal court is merely to determine whether the state by some official action has provided due process or has failed in that duty; and if a denial of due process appears, it can only pronounce the proceedings void. The power of the Federal government ordinarily ends with that act. Thus the primary duty of providing for the protection of life, liberty and property by due process of law rests still with the States, and the fourteenth Amendment operates merely as a guaranty additional to the state constitutions against encroachments on the part of the state upon fundamental rights, which their governments were created to secure. It did not radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people." [See United States v. Cruickshank, 92 U. S. 542, (23 L. ed. 588): In re Kemmler, 136 U. S. 436-438 (10 Sup. Ct. 930, 34

L. ed. 519.] "The Federal Supreme Court has again and again declared that when the highest court of a state has acted within its jurisdiction and in accordance with its construction of the state constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court may feel justified in saying that there has been a failure of due process of law. 'We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference. For especially in cases involving procedure, is it true that 'due process of law means law in its regular course of administration through courts of justice.'" McGehee, Due Process of Law, 167 citing Allen vs. Georgia, 166 U. S. 138 (17 Sup. Ct. 525, 41 L. ed. 949), which case is cited with approval in Wilson v. North Carolina, 169 U. S. 586, 595 *ss* (18 Sup. Ct. 435, 42 L. ed. 865). In Rawlins v. Georgia, 201 U. S. 638 (26 Sup. Ct. 560, 50 L. ed. 899, 5 Ann. Cas. 783), it was contended that because many lawyers, preachers, doctors, engineers, firemen, and dentists were excluded from jury service in Georgia by the jury commissioners failing and refusing to put any of the names of the classes excluded in the jury box, that the defendant had rights under the Fourteenth Amendment. In delivering the opinion of the court in that case, Mr. Justice Holmes said: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been compiled with. This is a mistake. If the state constitution and laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

In the recent case of Garland v. State of Washington, 232 U. S. 642 (34 Sup. Ct. 456), it was held that, "A conviction upon a second and amended information, after a prior conviction under the original information had been set aside and a new trial grnted, was not wanting in the due process of law guaranteed by U. S. Const., 14th Amend., because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty." In delivering the opinion of the court (which was unanimous), Mr. Justice Day said in part: "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the *tt* accusation and an adequate opportunity to defend himself in the prosecution. Rogers *v.* Peck, 199 U. S. 425, 435 (50 L. ed. 256, 26 Sup. Ct. Rep. 87), and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that

the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. * * * Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the prosecution of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case [162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097], when he said (p. 649): 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'" See Trono v. United States, 199 U. S. 521 (26 Sup. Ct. 121, 50 L. ed. 292, 4 Ann. Cas. 773). Authorities might be multiplied to the effect that if the state laws as construed by the state courts are not inconsistent with the provisions of the Fourteenth Amendment, that there is no denial of due process of law within the meaning of that provision of the Federal Constitution.

Art. 1, sec. 1, par. 4 of the constitution of the State of Georgia (Civil Code, §6360) declares that "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." By section 6079 of the Civil Code of 1910 it is provided that "The several superior courts of this State shall have power to correct errors and grant new trials in any cause or collateral issue depending in any of the said courts, in such manner and under such rules and regulations as they may establish according to law and the usages and customs of courts." And see sections 6080, et seq., as to the procedure in such cases. Provision is made that cases tried in the superior courts may be reviewed by the Supreme Court, which has appellate jurisdiction to hear and determine all cases civil and criminal that may come

before it, and to grant judgments of affirmance or reversal, etc. Civil Code, §6103. And how stands the case with reference to our state constitution and laws as affording the defendant due process of law? Art. 1, sec. 1, par. 3 of the constitution of Georgia (Civil Code, 1910, §5700) provides that "No person shall be deprived of life, liberty or property, except by due process of law." This provision of the State constitution is in substantial accord with the Fourteenth Amendment to the constitution of the United States, which *vv* declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Civil Code, §6700. Thus it will be seen that provision has been made in the "law of the land" by which all who are charged with crime can make their defenses, and in case of conviction in the trial court, they can make a motion for a new trial in that court on account of any alleged errors which may have been committed in the trial court. If the motion is denied by the trial court, the accused can take the case to the Supreme Court by writ of error, or by direct bill of exceptions, and have the case reviewed. We think it can not be said, therefore, in view of the ample provisions made by the constitution and laws of Georgia for any one accused of crime to exercise his right of defense in our courts, that he is denied "due process of law" or the equal protection of the laws. See Frank v. State, 141 Ga. 243 (80 S. E. 1016.)

2. In this State a defendant charged with crime and tried by a jury is given the right, by motion for a new trial, to have reviewed a verdict and judgment rendered against him, and have it set aside for an illegality, of irregularity amounting to harmful error, in the trial, including such grounds as the reception of a verdict in his absence. But where such motion is made, it should include all proper grounds which were at the time known to the defendant or his counsel, or which by reasonable diligence could have been discovered. Leathers v. Leathers, 138 Ga. 740 (76 S. E. 44). A motion in arrest of judgment is also available to the defendant in a proper case, but a motion in arrest of judgment must be made during the term of court at which the judgment was obtained, and must be predicated upon some defect which appears upon the face of the record or pleadings. Civil Code, 1910, §5958. But this court has decided a number of times that objections to the reception of a verdict in the *ww* absence of the defendant, and to recharging the jury in the absence of the prisoner, and similar alleged errors, can be made in a motion for a new trial. In Wade v. State, 12 Ga. 25, the defendant, a verdict for assault with intent to rape being rendered against him, made a motion for a new trial, one of the grounds being that the court read testimony taken down by the court to the jury in the absence of the prisoner and without consent of the prisoner's counsel. It was held in that case that, "The court has no more authority under the law to read over testimony to the jury, affecting the life or liberty of the defendant, in his absence,

than it had to examine the witness in relation thereto in his absence." A new trial was accordingly granted. The court merely treated the ground of the motion for a new trial as an irregularity, and not as a nullity. In Martin v. State, 51 Ga. 567, the defendant was indicted for simple larceny, and the court charged the jury the second time in the absence of the defendant and his counsel. This court did not treat the verdict of guilty as a nullity, but said: "As this important privilege was lost to the defendant in this case, and at a critical stage of the trial, through a mistake of the State's counsel, at least it is positively so stated by defendant's counsel, and doubtless the court was misled by it, we think there should be a new trial." Bonner v. State, 67 Ga. 510, was an indictment for murder, and there was a conviction for voluntary manslaughter. A motion for a new trial was made, which was overruled and the defendant excepted. A new trial was granted by this court, it being held that, "In a criminal case the prisoner has the right to be present in person throughout the trial. Therefore, for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel may have been present and kept silent was error." In Wilson v. State, 87 Ga. 583 (13 S. E. 566), there was indictment and trial for murder, and a motion for new trial. The trial court recharged the jury in the absence of the defendant. This court held this to be cause for a new trial. And to the same zz effect, see Tiller v. State, 96 Ga. 430 (23 S. E. 825); Hopson v. State 116 Ga. 90 (42 S. E. 412).

It will thus be seen that this court has held that a motion for a new trial is an available remedy in a case where during progress of the trial of one charged with a felony some step is taken by the court during the enforced absence of the defendant without his consent, and in such case the verdict rendered against the defendant will not be treated as a nullity, but it will be set aside and a new trial granted. It will also be seen that where a motion for a new trial is made, that the defendant must in his motion for a new trial set out all that is known to him at the time, or by reasonable diligence could have been known by him as grounds for a new trial.

Did the defendant in the instant case know at the time he made his motion for a new trial that he was absent without his consent when the verdict of guilty was rendered against him? He must of necessity have known it, and likewise his counsel. In one ground of his motion for a new trial (which was reviewed and passed on by this court in the case of Frank v. State, supra), it was alleged: "Defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel." When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion and which was known to him at the time. As we have seen, the defendant could have made the question under consideration in the motion for a new trial. In Daniels v. Towers, 79 Ga. 785 (7 S. E. 120), a judgment of conviction for felony had been affirmed by the Supreme Court on writ of error brought by the defendant, and this court held that the legality of his conviction could not be

brought into question by writ of habeas corpus sued out by him, save for the want of jurisdiction appearing on the face of the record as brought from the court below to the Supreme Court.

yy In delivering the opinion of the court, Judge Bleckley said (p. 789): "We rest the case upon the general rule that, after a judge of the superior court has presided in any case in the superior court of any county, and the judgment rendered at the trial has been affirmed by this court, it is to be taken for all purposes that it was a legal trial and judgment, and can not be questioned for anything but the want of jurisdiction appearing upon the face of the proceedings as ruled upon here. If there is more record below, and the plaintiff in error after conviction does not bring it up, it is his own misfortune. He had an opportunity to bring it up. He must abide the judgment upon the record which he brings here; and if the judgment is legal according to that record, he must take the consequences. It will not do to allow him to bring up his case in sections, whether there is a trial of it by a court divided in sections or not; he must bring up his whole case as he expects to stand upon it for all time; and if he does not do it, neither he nor his friends can repair the error afterwards."

In support of his contention, the plaintiff cites the case of Hopt v. People of Utah, 110 U. S. 574 (4 Sup. Ct. 202, 28 L. ed. 262). Hopt was tried on an indictment for murder, found guilty and sentenced to suffer death. The judgment was affirmed by the Supreme Court of the Territory of Utah. Upon writ of error to the Supreme Court of the United States the judgment was reversed and the case remanded, with instructions to order a new trial. A statute of Utah provided that, "If the indictment is for a felony the defendant must be personally present at the trial, but if for a misdemeanor, the trial may be had in the absence of the defendant." The triors of the competency of the jurors, appointed by the court, conducted their examination of the jurors in a different room, and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. The Supreme Court of the United

zz States, in construing the statute of Utah, said that under their construction the trial, by triors, appointed by the court, of challenges of proposed jurors in felony cases must be had as well in the presence of the court as of the accused; and that such presence cannot be dispensed with. But it will be observed that the decision was placed upon a construction of the statute of Utah which required the personal presence of the accused at every stage of the trial. It was said by Mr. Justice Harlan, who delivered the opinion, that "all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be 'personally present at the trial.'" The absence of the defendant, however, was treated as an irregularity, as shown by the judgment remanding the case and ordering that a new trial be had. Ball v. United States, 140 U. S. 118 (11 Sup. Ct. 761, 35 L. ed. 377), was also relied upon. In that case it did not affirmatively appear from the record that the defendant was present when sentence was pronounced upon him. It was said that "At common law it

was essential in a trial for a capital offense, that the prisoner should be present, and that it should appear of record that he was asked before sentence whether he had anything to say why it should not be pronounced." The defendant was convicted of murder, and filed a motion for new trial, and to arrest the judgment, both on the same date, but whether along with the other motion is not clear. The case was remanded with direction to quash the indictment because it failed to show the time and place of death, p. 133. In delivering the opinion of the court, Chief Justice Fuller said (p. 132): "We do not think that the fact of the presence of the prisoner can by fair intendment be collected from the record, no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual questions not having been propounded." The Chief Justice further *aaa* said: We are clear that the indictment is fatally defective, and that a capital conviction, even if otherwise regular, could not be sustained thereon." While it seems to be the practice in the federal courts in capital felonies, that the record should show that the defendant was present and was asked whether he had anything to say why sentence should not be pronounced, it has never been the practice in this State "to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered, and when the sentence was pronounced, and from arraignment to sentence, or that the prisoner was asked, before sentence whether there was any reason why sentence should not be pronounced upon him. The silence of the record as to such facts is, therefore, no cause for arresting the judgment or setting it aside." Rawlins v. Mitchell, 127 Ga. 24 (55 S. E. 958). See also Nolan v. State, 53 Ga. 137 (3).

Counsel for the defendant rely on the cases of Nolan v. State, 53 Ga. 137, and Nolan v. State, 55 Ga. 521 (21 Am. R. 284). In the former case the defendant was indicted for the offense of murder, and the jury found him guilty of voluntary manslaughter. When the jury were out and before the verdict was returned, counsel for the accused consented that if the jury agreed on a verdict that night they could return a sealed verdict to the clerk of the court and disperse. They did not agree that night, but did on the following day, and their verdict was received in the absence of the prisoner and his counsel. The defendant made a motion in arrest of judgment on the ground that the consent extended only in case of agreement that night and not to the next day. It was held that "consent of counsel that should the jury agree that night, they might return a sealed verdict to the clerk and disperse, can not be construed to extend to a verdict found on the next day." "It was the legal right of the defendant to be present when the verdict was rendered, and had a motion to set aside such verdict been made on the *bbb* ground of his absence, it should have been granted." By the motion in arrest of judgment the defendant sought to arrest the judgment as a nullity. But the court said that no motion under section 4629 of the Code then in force could be sustained for any matter not affecting the real merits of the offense charged in the indictment. The judgment of the court below overruling the motion

in arrest of judgment was therefore affirmed. The court also said, "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on account of his absence, the motion should have been granted by the court." This last statement, from an examination of the record, is obiter. But what was probably meant by a motion to set aside was in the sense of being a motion for a new trial, as such motions have been likened to motions in arrest and to set aside. See Prescott v. Bennett, 50 Ga. 266-272, where Judge Trippe said: "It is true that a motion entitled a motion to set aside, is sometimes made for matters extrinsic the pleadings or record. In such cases, they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect." This is probably what Judge Warner meant by the obiter expression quoted above from the Nolan case; for, from the cases cited in which opinions were delivered prior to that utterance, it will be seen that a motion for a new trial was an available remedy in such cases, and it will be noted, too, that Judge Warner presided and delivered the opinion of the court in the Prescott case, in which Judge Trippe used the language quoted above in his concurring opinion. In the Nolan case decided in 55th Georgia, 521, Nolan was placed on trial for the offense of murder. Evidence was submitted to the jury, argument had and a charge delivered by the court. Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary manslaughter, and were discharged. The defendant, at a subsequent term, moved to set aside the verdict rendered against him on the ground that it was rendered and published in his absence and without his right of being present having been waived. The trial court ordered accordingly. Subsequently, the defendant was arraigned again upon the same indictment, and he pleaded specially in bar facts as constituting his having been placed once in jeopardy, and claimed his discharge. This court held, that "A verdict so received, having been, on his motion, set aside as illegal, when afterwards arraigned for trial on the same indictment for the offense before another jury, the prisoner may plead specially his former jeopardy in bar of a second trial, and if supported by the record and the extrinsic facts, the plea should be sustained, and, thereupon, the prisoner should be discharged. It will be observed that the defendant in the Nolan case treated the verdict as a nullity and made a motion to set it aside as such, which was done, instead of making a motion for a new trial and setting up his defense as an irregularity and seeking a new trial because of some error committed at the trial. In the latter case, he would waive the fact that the verdict was a nullity, but insist that it was merely irregular or erroneous, requiring a new trial. Judge Bleckley, delivering the opinion in the last Nolan case, said: "One trial, and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all countries. For the public authority, whether king or commonwealth, to try the same person over and

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over again for the same offense, would be rank tyranny. * * * Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment on a void indictment has been arrested, the transcendent importance of the rule itself requires that the exceptions should be few and strictly guarded."

ddd In the instant case, the defendant made a motion for a new trial, which was overruled by the court (paragraphs 6 and 7 of defendant's motion; also Frank v. State, supra), thus treating the verdict not as a nullity, but as an irregularity. In Smith v. State, 59 Ga. 513 (27 Am. R. 393), it was held that although the prisoner be in custody he may consent that the verdict shall be received in his absence, and that a verdict thus received was valid, notwithstanding he was at the time confined in jail. The facts in this case were somewhat similar to the Nolan case as to the agreement. The court said: "He ought to have been brought from the jail, so as to be present at the reception. But we think it was merely an irregularity and that no matter of substance was involved. Having surrendered his right to poll the jury, no other of any value to him remained, for the exercise of which his presence was important. Had he been in court, the result must have been the same as it was. Nothing took place in his absence, but the mechanical act of receiving the verdict, as the consent had provided it should be received. If he had been present, the act would have been no less mechanical. In Nolan's case (53 Ga. 137, 55 ib. 521), the event contemplated did not happen." We conclude from these authorities that the question here raised could have been adjudicated under a motion for a new trial and that a failure to include this ground in such motion, would preclude the defendant, after denial of the motion, and the affirmance of the judgment by this court, from seeking to set aside the verdict as a nullity.

3. The motion to set aside the verdict complains of the reception of the verdict in the involuntary absence of the defendant while he was incarcerated in jail, and in the absence of his counsel. Paragraph 2 of the motion avers that he did not waive that right, nor did he authorize anyone to waive it for him, nor did he consent that he should not be present; that he did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and that he did

eee not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him. Paragraph 3 of the motion alleges that on the day the verdict was rendered, and shortly before the judge who presided on the trial of the case began his charge to the jury the judge privately conversed with two of the counsel for the defendant, and in the conversation referred to the probable danger of violence to the defendant and his counsel, if he or they were present when the verdict was rendered and it should be one of acquittal, and after the judge had thus expressed himself, he requested counsel to agree that the defendant should not be present at the time the verdict was rendered and the jury polled; that under circumstances counsel did agree

with the judge that the defendant should not be present at the rendition of the verdict, and he was not present at the rendition of the verdict, nor were his counsel present. It is contended that it is the constitutional right of the defendant to be present at every stage of the trial, and that he can not waive that right, nor can his counsel waive it for him, and that his absence at the reception of the verdict vitiates the whole trial.

It is the undoubted right of a defendant who is indicted for a criminal offense in this State to be present at every stage of his trial. But he may waive his presence at the reception of the verdict rendered in his case. In Cawthorn v. State, 119 Ga. 395 (46 S. E. 897), a waiver was made by the defendant's counsel in his presence as to his personal presence at the reception of the verdict. This court held in that case: "8. Even if an attorney, by virtue of the relation of attorney and client existing between himself and one charged with a felony, has no implied right to waive the right of his client to be present at the reception of the verdict, if the attorney makes an express waiver to this effect in the presence of the client, who does not at the time repudiate the action of his counsel, a verdict afterwards received in the absence of the accused and in *fff* consequence of the waiver will not be held to be invalid at the instance of the accused, seeking, after the reception of the verdict, to repudiate the action of his counsel in making the waiver." "9. Before a verdict received in the absence of the accused will be held to be invalid, it is incumbent upon the accused to show that he was in custody of the law at the time the waiver was made, that he made no waiver of his right to be present, and that he did not authorize his counsel to make such waiver for him, and, if an unauthorized waiver has been made by counsel, that he has not ratified the same or allowed the court to act upon the waiver of counsel after he has notice that the same has been made." Judge Cobb, who delivered the opinion of the court in the Cawthon case, after citing a number of authorities, pro and con, said (p. 413): "These decisions seem to draw no distinction between a waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. Such a waiver is to all intents and purposes the waiver of the client. It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act. And while we recognize fully that there are limitations upon the authority of counsel, the client, even though he be charged with a capital felony, should not be allowed to impeach the authority of his counsel, when he acts in his presence, unless he promptly repudiates the unauthorized act before the court bases action upon it. Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver, his authority arising from the mere rela-

tion of attorney and client. The reasoning of the courts that
ggg hold to the contrary is not, in my opinion, satisfactory or by any means conclusive. Counsel is generally much better able to take care of the rights of the accused than he is himself, and the accused is better protected from improvident waivers by his case being left to the control of his counsel than if he were to take charge of the same in his own behalf." As said by this court, in effect, in the case of Lampkin v. State, 87 Ga. 517 (13 S. E. 523), it is not sound practice for counsel to make a waiver of their client's presence at the reception of the verdict, take the chances of acquittal for their client, and then after verdict of guilty, the defendant should be allowed to repudiate the action of counsel, and employ other counsel to set aside the verdict because of the absence of the defendant at the time it was rendered. Who was better prepared to protect the interests of the defendant, trained and expert counsel, or the defendant himself? True, he had the right to conduct the trial in person, if he so desired; but the defendant had committed his case to able and experienced counsel, who in the exercise of their relation as attorney to the client waived his right to be present, and having made the waiver, and defendant by his conduct having acquiesced in it, he should be bound by it.

In the instant case, the defendant in his motion to set aside the verdict as a nullity says that he did not know of the waiver of his presence made by his counsel. After the verdict of guilty was rendered against him in the trial court, the defendant made a motion for a new trial on various grounds, and the motion being overruled, a writ of error was sued out to this court and the judgment of the lower court affirmed. See Frank v. State, supra. The 75th ground of that motion contains the following recital, among others, "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel." We pause here long enough to say that this court will take judicial notice of its own records, and will of its own motion, or at the suggestion
hhh of counsel, inspect the records of this court in a former appeal of the same case. Strickland v. Western & Atlantic R. Co., 119 Ga. 70 (45 S. E. 721); Dimmick v. Tompkins, 194 U. S. 540, 548 (24 Sup. Ct. 780, 48 L. ed. 1110) and authorities there cited; Mississinewa Min. Co. v. Andrews, 28 Ind. App. 496 (63 N. E. 231); Culver v. Fidelity & Dep. Co., 149 Mich. 630 (113 N. W. 9); Studebaker v. Faylor, 52 Ind. App. 171 (98 N. E. 318); Mayhew v. State (Tex. Crim.), 155 S. W. 191 (5); South Fla. Lumber &c. Co. v. Read, 65 Fla. 61 (61 So. 125); Bohanan v. Darden, 7 Ala. App. 220 (60 So. 955); Alabama &c. R. Co. v. Bates, 155 Ala. 347 (46 So. 776 (2); McNish v. State, 47 Fla. 69 (36 So. 176); Westfall v. Wait, 165 Ind. 353 (73 N. E. 1089, 6 Ann. Cases, 788); 1 Chamberlyne's Modern Law of Evidence, § 683, p. 850.

The motion under review recites that "the said Judge, Hon. L. S. Roan, upon considering the motion for new trial made by this defendant, after the reception of said verdict, as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty, etc."

When, therefore, the defendant by motion for a new trial invoked from the court a ruling upon alleged errors that had been committed upon the trial (reciting on the face of the motion a knowledge of his absence when the verdict was returned, and the waiver of his presence), he will not now be heard to say that the verdict was a nullity on account of his not being present at its rendition, after the motion for a new trial has been denied and the judgment denying it affirmed by this court. Frank v. State, supra. And moreover an extraordinary motion for a new trial was made and has likewise been refused and the judgment overruling it affirmed by this court. Frank v. State, 142 Ga. — (83 S. E. —.) He had the right to invoke a ruling on that question in the motion for a new trial, and failing to do so, he can not now be heard to say that
iii he will treat the verdict as a nullity and move to have it set aside as such. It would be a reproach upon the court's administration of the law to allow a defendant to make a motion for a new trial, with a knowledge of his absence when the verdict against him was rendered, and have the grounds of the motion adjudicated by the court, and then move to set the verdict aside as void. The defendant necessarily knew when sentenced by the court, for he was then present, that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law. His motion for a new trial recited that his presence at the reception of the verdict had been waived by his counsel. Under these circumstances, it must be held that the defendant acquiesced in the waiver by his counsel of his presence at the reception of the verdict. It would be trifling with the court to allow one who had been convicted of a crime, and who had made a motion for a new trial on over a hundred grounds, including the statement that his counsel had waived his presence at the reception of the verdict, and have the motion heard by both the superior and supreme courts, and after a denial by both courts of the motion to now come in and by way of a motion to set aside the verdict include matters which were or ought to have been included in the motion for a new trial. While a defendant indicted for crime in this State has the legal right to be personally present at every stage of his trial, as before stated, there are certain matters which he may waive, and which many prisoners do waive at their trial. They may waive copy of indictment, formal arraignment, and list of witnesses before the grand jury, all of which are important rights. They may waive a preliminary hearing before a committal court; a jury of twelve to try them; or any legal objection to jurors who have qualified on their voir dire; they may even waive trial entirely, plead guilty of murder and be sentenced to hang. Sarah v. State, 28 Ga. 576 (2).
581; Wiggins v. Tyson, 112 Ga. 745, 750 (38 S. E. 86).
jjj These are rights personal to the defendant, and it would be absurd to say that when his counsel had waived his presence at the reception of the verdict, and this waiver had been brought to his attention in ample time for him to move for a new trial on that ground, which he fails to do until after he makes a motion for

a new trial, with knowledge of the fact of absence when the verdict was rendered, and then after the motion had been finally adjudicated against him, he could then move to set aside the verdict as a nullity. We may add that the allegations of the petition show that at the rendition of the verdict the jury was polled by the court, under an agreement had with the defendant's counsel when the waiver was made. In this State after a verdict of guilty of murder and the overruling of a motion for a new trial, a writ of error will lie to this court, assigning error on the overruling of the motion. In some jurisdictions the practice is different. But on examination of the cases in other jurisdictions in which a complaint of the reception of a verdict in the absence of the accused was made and sustained, it will be found that very commonly this was treated as a ground for remanding the case for another trial. We know of no provision in the constitution of the United States, or of this State, nor of any statute, which gives to an accused person a right to disregard the rules of procedure in a State, which afford him due process of law, and demand that he shall move in his own way and be granted absolute freedom because of an irregularity (if there is one) in receiving the verdict. If an accused person could make some of his points of attack on the verdict, and reserve other points known to him, which he could then have made, to be used as grounds for further attacks on the verdict, there would be practically no end to a criminal case.

4. Comparing the grounds of the motion to set aside the verdict in this case on the ground of disorder in the court room during the progress of the trial: of cheering and applause outside of the court room; and of the oral remarks of the trial judge before signing the order denying a new trial, with the grounds of the motion for a new trial made in the former record in this case (see Strickland v. W. & A. R. Co. 119 Ga. 70) when it was here under review upon the denial of that motion (Frank v. State, 141 Ga. 243), it will be seen that the questions there made as to these matters were substantially the same as those sought to be raised by the present motion, and the questions there raised were adjudicated by this court in that case adversely to the contentions of the defendant. This Court, therefore, will not again consider those same questions when sought to be raised by the motion to set aside the verdict now under review.

kkk

Judgment affirmed. All the Justices concur except Fish, C. J., absent on account of sickness.

lll Copy motion for new trial in Leo M. Frank vs. State of Georgia exhibited to and considered by me in Ex parte Leo M. Frank, Petition for Writ of Habeas Corpus.

Let same be filed.

(Signed) WM. T. NEWMAN,
Judge U. S. Dist. Court, Northern Dist. of Ga.

In the Supreme Court of Georgia, October Term, 1913.

No. 18.

LEO M. FRANK, Plaintiff in Error,
vs.
STATE OF GEORGIA, Defendant in Error.

In Error from Fulton Superior Court.

Conviction of Murder.

Motion for New Trial.—Amended Motion for New Trial.—Charge of the Court.

Attorneys: Rosser & Brandon, Reuben R. Arnold, Herbert J. Haas, Leonard Haas, for Plaintiff in Error.

Filed in Open Court December 21, 1914.
(Signed) O. C. FULLER, *Clerk*,
By J. D. STEWARD, *Deputy Clerk*.

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1 *Original Motion for New Trial.*

STATE OF GEORGIA
VS.
LEO M. FRANK.

Conviction of Murder in Fulton Superior Court.

Motion for New Trial.

And now comes the defendant in the above stated case and moves the court for a new trial upon the grounds following, to-wit:

1. The verdict is contrary to the evidence.
2. The verdict is contrary to the law.
3. The verdict is against the weight of the evidence.
4. The court, over the objection of the defendant, heard evidence of other transactions and tending to establish other crimes and offenses, wholly separate and distinct from the charge in the Bill of Indictment, to the injury and prejudice of the defendant.

Wherefore, for these and other good grounds to be urged upon the hearing, the defendant, Leo M. Frank, moves that said verdict be set aside and a new trial granted.

REUBEN R. ARNOLD,
L. Z. ROSSER,
HERBERT J. HAAS,
Attorneys for Leo M. Frank, Movant.

Read and considered. Let the foregoing motion for new trial be filed and let a copy thereof be served upon the Solicitor General. It is ordered that the State show cause before me on the fourth day of October 1913, at my Chambers, Thrower Building, Atlanta, Ga., why the verdict should not be set aside and a new trial granted. In the meantime, and until after this motion may be heard, it is ordered that the movant have the right to prepare and have approved and filed a proper brief of the evidence in said case; and that should said motion be postponed, that such right to prepare and have approved and file such brief of the evidence shall exist and remain in the movant until such time as the motion may be finally heard. In the meantime let the execution of the court's sentence be sus-
2 pended. It is further ordered that until such time as this motion may be heard and decided, that the movant have full leave to amend this motion for new trial.

This 26th day of August, 1913.

L. S. ROAN,
Judge S. C. Stone Mountain Circuit, Presiding.

GEORGIA,
Fulton County:

Service acknowledged. Copy received. All other and further service waived.
This Aug. 27, 1913.

F. A. HOOPER,
HUGH M. DORSEY,
E. A. STEPHENS,
Solicitor General, Fulton County, Georgia.

We further agree to the order within giving time to prepare and file a legal brief of the evidence. Aug. 27, 1913.

HUGH M. DORSEY,
Solicitor General.

Amended Motion for New Trial.

GEORGIA,
Fulton County:

Fulton Superior Court, July Term, 1913.

No. —.

STATE OF GEORGIA
VS.
LEO M. FRANK.

And now comes the defendant in the above stated cause, Leo M. Frank, and amends his motion for new trial heretofore filed in this case, and says:

That the verdict in the above stated case should be set aside and a new trial granted for the following reasons, to-wit:

1. Because the Court erred in permitting the solicitor to prove by the witness, Lee, that the detective Black talked to him, the witness, longer and asked him more questions at the police station than did Mr. Frank the day when he talked to the witness Lee at twelve (12) o'clock at night on April 29th.

At the request of Black and Scott, the detectives, Frank was induced to have an interview with Lee, the witness, for the purpose of eliciting information from him. The solicitor contended that Frank made no effort to find out anything from Lee, and to the end sought to show and was permitted to prove by Lee that Black talked longer to him than did Frank at the time stated.

The defendant, then and there at the trial, objected to such evidence upon the ground that it was irrelevant, immaterial, and was a mere conclusion of the witness. The Court admitted the evidence, over such objections, and in doing so erred, because said evidence was unwarranted, immaterial and a mere conclusion of the witness and injurious to the defendant.

3 2. Because the Court erred in permitting, over objections the witness Lee to testify that Frank, on April 29th, when alone with him at the station house, talked to him a shorter time than did Mr. Arnold, one of Frank's attorneys, when he interviewed the witness just before the trial.

The detectives had induced Frank to talk to Lee alone on April 29th at the station house for the purpose of inducing Lee to talk. Mr. Arnold, in the presence of Lee's attorney, and the jailer, had interviewed Lee just before the present trial.

The solicitor, over the objections of Frank's attorneys that the evidence offered was immaterial, irrelevant, and the expression of an opinion, was permitted by introducing said evidence to draw a comparison of the time occupied by Frank and Arnold to their respective interviews, and, in doing so, the Court erred because the evidence offered was immaterial, irrelevant and the expression of an opinion.

3. Because the Court permitted the solicitor over the objection of defendant made at the time the evidence was offered that the same was irrelevant and immaterial, to show by the witness J. N. Starnes that the witness Lee, the morning the body was found, while in the office of the pencil factory and when under arrest was composed. Said evidence was objected to as illegal, unwarranted and hurtful to the defendant and movant now says that its admission was error for the same reasons.

This evidence was hurtful, because used by the solicitor in his address to the jury in contrasting the deportment of Frank, who was claimed to be nervous and excited.

4. Because the Court erred in permitting the witness Starnes, over objection of the defendant, made when the evidence was offered, because it was a conclusion, to say that his conversation with Frank over the telephone the morning of the finding of the body, was guarded—that he was guarded as to what he said.

This evidence was objected to as unwarranted and a conclusion, and movant here assigns its admission as error for the same reasons.

Movant contends this was hurtful to the defendant, and there was a dispute as to what Starnes said to Frank in that conversation, and the solicitor contended that Frank's words and conduct in connection with that conversation was evidence of his guilt. Starnes' statement that he was guarded in that conversation as to what he said, tended to impress the jury that he was accurate in his memory as to the words of the conversation.

5. Because the Court admitted what purported to be a picture of the second or office floor, the street floor and basement of the factory. On this picture was traced red dotted lines extending from the back of the office door, down the elevator to the basement, and down the basement near the back of the building. There were, also, Greek crosses on the picture. It was conceded by the State

4 that these dotted lines and crosses were no part of nor represented any part of the building but were put in the picture for the purpose of illustrating the theory of the State, as showing where the body was found and where it was carried.

The admission of the picture in evidence, with the lines and crosses

thereon, was, when offered, objected to because, as movant contends, it was argumentative, representing and illustrating the State's view of the case by means of red lines and crosses, which was no part of, nor illustrated any part of the building.

The admission of said diagram and drawing was error for the same reasons as set out in the above objections, the objection being that the same was illegal and prejudicial, and movant assigns error in their admission for the same reason.

6. Because the Court, over objection made when the evidence was offered, that the same was a conclusion, permitted the witness Black to testify that in a conversation had with Frank months before the tragedy that he didn't remember anything that caused him to believe that Frank was nervous, the hurtful purpose being to compare his then conduct with that after the tragedy.

This evidence here objected to was illegal, a conclusion, and prejudicial, and movant says its admission was error for said reasons.

7. Because the Court, over objection made when the evidence was offered that the same was irrelevant, permitted the witness Black to testify that Frank had counsel, Messrs. Rosser and Haas about eight or eight thirty o'clock Monday morning while Frank was in the station house, brought there by detectives Black and Haslett.

Movant contends the employment of counsel, under the circumstances was no evidence of guilt; but the Court's conduct in submitting the fact to the jury was greatly hurtful to the defense.

Said evidence was illegal, irrelevant and prejudicial and its admission over objection is here assigned as error for said reasons.

8. Because the Court refused to permit the witness Black to testify on cross-examination that when he found a bloody shirt in the bottom of a barrel in Newt Lee's house, that he carried the shirt to the station house, showed it to Lee, and, when Lee was asked by the witness if the shirt was his, the solicitor objected that the witness should not be allowed to answer the question: "Did he (Lee) say that the shirt was his?"

The Court would not permit the witness to give Lee's answer that the shirt was his.

This answer of Lee's was, as movant contends, part of the res gestæ of the shirt transaction, and Lee's answer ought to have been heard.

The Court erred, as movant contends, in ruling out the answer of Lee and not allowing it to come out as a part of the entire transaction.

5 9. Because the Court, over objection made by the defendant at the time the same was offered, that it was immaterial and irrelevant, permitted the witness Darley to testify that on the morning the body was found Newt Lee was composed.

Defendant objected to this evidence as illegal, irrelevant and prejudicial to defendant which objection was overruled and movant assigns its admission as error for said same reasons.

This evidence was not only irrelevant and immaterial, as movant contends, but hurtful, because this evidence was heard upon the theory of comparison between the conduct of Lee and Frank.

10. Because the Court erred in failing, refusing, and declining, upon motion of the defendant made while the witness Conley was on the stand, to rule out, withdraw and exclude from the jury each and all of the following questions and answers of the witness Conley:

Q. What did he mean?

A. Well, what I taken it to be, the reason he said he wasn't built like other men, I had seen him in a position I hadn't seen any other man in that has got children.

Q. What position?

A. I have seen Mr. Frank in the office there about two or three times before Thanksgiving and a lady was in the office, and she was sitting down in a chair and she had her clothes up to here (up to her waist) and Mr. Frank was down on his knees, and she had her hands on Mr. Frank, and I found them in that position.

Q. When you came into the office before Thanksgiving day, now, when the lady was sitting in the chair?

A. Yes, sir; he saw me when he came out of the office, he saw me.

Q. What was said when they saw you.

A. When Mr. Frank came out of the office Mr. Frank was hollering "Yes, that is right, that is right" and he said, "That is all right, it will be easy to fix it that way."

Q. Well, did you ever see him on any other occasion?

A. Yes, sir; I have seen him on other times there.

Q. What other occasions?

A. I have seen Mr. Frank in the packing room there one time with a young lady lying on the table.

Q. How far was the woman on the table?

A. Well, she was on the edge of the table when I saw her.

The motion was made while the witness Conley was on the stand, and before any cross-examination had been had upon either of the circumstances referred to in said questions and answers, but after cross-examination upon other subjects had progressed a day and a half. The motion to rule out, withdraw and exclude was made because, as stated to the Court when the motion was made, said questions and answers were immaterial, irrelevant, illegal, prejudicial, and dealing with other matters and things and crimes irrelevant and disconnected with the issue in the case then on trial.

6 Movant contends this evidence was highly prejudicial, and the failure of the Court, upon proper motion, to rule it out was a great injury to the defendant. And the failure of the Court to rule out said prejudicial and irrelevant and immaterial evidence is here assigned as error and a new trial should be granted because said evidence was illegal, irrelevant and highly prejudicial and involved other transactions not legitimately under investigation, and the same amounted to accusing the defendant of other and independent crimes.

11. Because the witness Conley, at the instance of the solicitor, was permitted to testify that he had seen Frank in a position with women that he had not seen any other man in that has children; that he had seen Frank in the office of the Pencil Company about two or three times before Thanksgiving and a lady was in the office and

she was sitting down in a chair and she had her clothes up about her privates, and Frank was down on his knees, and she had her hands on Frank; that Frank saw Conley when he came out of the office, that when Frank came out of the office he was hollering "Yes, sir, that is right, that is right" and he said "That is all right," it will be easy to fix it that way;" that at another time he saw Frank in the packing room of the factory with a young lady lying on a table—she was on the edge of the table when he saw her.

While Conley was on the stand, and before he was crossed about seeing the circumstances testified about, and after cross examination upon other subjects had been had for a day and a half, counsel for the defendant moved the Court that the next above stated testimony of the witness Conley be ruled out, withdrawn and excluded from the jury, stating at the time that such motion ought to be granted, because the testimony was irrelevant, immaterial, illegal, prejudicial, and dealing with other matters and things, and crimes, irrelevant and disconnected with the issues in this case.

The Court declined to rule out, withdraw, or exclude this testimony from the jury, but permitted the same to remain before the jury.

The action of the Court was erroneous and highly prejudicial to the defendant, and demands a new trial.

Such action of the Court was error because said evidence was illegal, irrelevant and hurtful to the defendant and involved other transactions not legitimately under investigation, and the same amounted to accusing the defendant of other and independent crimes.

12. Because the witness Conley, when on the stand, testified that he watched for Frank, at the Pencil Factory, four times on Saturdays, not on the day of the murder, and once on Thanksgiving day, 1912, while Frank was with women in his office, detailing certain signals by which the witness Conley was to lock and open the door.

When the first question was asked by the solicitor seeking to elicit whether witness had ever seen Frank up there in his office doing anything with young ladies before April 26, 1913, the defendant
7 objected on the ground that the evidence sought was irrelevant and immaterial. The Court ruled that the evidence would be immaterial, but further questions were asked by the solicitor and elicited the evidence here complained of.

While Conley was still on the stand, and after cross examination a day and a half on other subjects, defendant's counsel moved to rule out, exclude and withdraw from the jury all the testimony, both direct and on cross, detailing Frank's associations with women and Conley's watching at other times than the Saturday of the murder, to-wit: April 26, 1913. Said motion was made upon the grounds stated and argued at the time the motion was made, that such testimony was immaterial, irrelevant, illegal, prejudicial, and dealt with other matters and things and crimes irrelevant to, and disconnected with, the issues on trial in this case.

The Court declined the motion made at the time upon the grounds, as stated, and in doing so erred, because the evidence sought to have

been ruled out for the reasons stated, and the same amounted to accusing the defendant of other and independent crimes.

13. Because the Court, upon motion made when the witness Conley was still on the stand, declined to rule out, exclude and withdraw from the jury each and all the below questions propounded to witness Conley, and his answers thereto:

Q. Now, tell what kind of work you had done for him the other Saturdays.

A. I always stayed on the first floor, like I stayed on the 26th of April, and watched for Mr. Frank, while he and a young lady would be on the second floor chatting.

Q. You say chatting. Do you know what they were doing?

A. No, sir, I don't know what they were doing. He only told me they wanted to chat.

Q. Did you ever see him up there doing anything with young ladies?

A. Well, I have——

Q. Well, what would you do before when young ladies come there?

A. I would sit down on the first floor and watch the door for him.

Q. And watch the doors for him?

A. Yes, sir.

Q. How many times did you watch the door previous to Saturday, the 26th of April, 1913?

A. Well, I couldn't exactly tell you; it has been several times I watched for him.

Q. Who was there when you were watching the door?

A. Well, I don't know, sir, who would be there when I watched the door, but there would be another young man and another young lady there during the time I was at the door; a lady for him and one for Mr. Frank.

Q. Now, was Frank ever there alone?

A. Mr. Frank was there alone once, and that was Thanksgiving Day, that I watched for him.

Q. Well, do you know or not the lady—did any woman come there that day?

A. Thanksgiving Day?

Q. Yes.

A. Yes, sir.

8 Q. What kind of a looking woman?

A. She was a tall, heavy built lady.

Q. What did you do on that occasion?

A. I stayed down there and watched the door, just as he had told me to do this last time.

Q. Then what was done?

A. Well, after the lady came and he stamped for me, I went and unlocked the door as he said. He told me when he got through with the lady he would whistle, and when he whistled for me to go and unlock the door.

Q. That was on Thanksgiving day of what year?

A. Of last year, 1912. * * *

Q. He says: "What I want you to do, I want you to do, I want you to watch for me today as you have on other Saturdays."

A. And I says: "All right." * * *

And he says: "Now, when the lady comes, I will stamp as I did before."

Q. What did he mean?

A. I have seen Mr. Frank in the office there about two or three times before Thanksgiving, and a lady was in the office, and she was sitting down in a chair, and she had her clothes up to here (indicating), and Mr. Frank was down on his knees, and she had her hands on Mr. Frank, and I found them in that position.

Q. Well did you ever see him on any other occasion?

A. Yes, I have seen him another time there.

Q. What other occasion?

A. I have seen Mr. Frank in the packing room one time with a young lady lying on the table.

Q. How far was the woman on the table?

A. Well, she was on the edge of the table when I saw her. * * *

Q. Do you know the name of the woman that was up there with Mr. Frank?

A. Thanksgiving day?

Q. Yes.

A. No, sir. I don't know her name.

Q. Do you know the name of the other woman?

A. No, sir. I know the young man's name that was with one of the ladies, but I don't know the other lady's name. I know where she lives at.

Q. What is the name of the man?

A. That man's name is Mr. Dalton.

Q. Now, what kind of a looking woman was it that you saw there Thanksgiving day in Mr. Frank's office?

A. Well, she was a tall built lady, heavy weight, she was nice looking, she had on a blue looking dress with white dots in it, and she had on a grayish looking coat with kind of tails to it. The coat was open like that (indicating), and she had on white slippers and stockings.

Q. Did Mr. Frank see you that time?

A. Thanksgiving day?

Q. Yes.

A. Yes, sir, he told me to come to the office—to come to the factory.

Q. When you come up into the office before Thanksgiving day now, when the lady was sitting in the chair?

A. Yes, sir. He saw me when he come out of the office, he saw me.

Q. What was said when they saw you?

A. When Mr. Frank come out of the office he was hollering: "Yes, that is right, that is right," and he said: "That is all right, it will be easy to fix it that way." * * *

9 Cross-examination:

Q. Now, you said you watched for Mr. Frank?
A. Yes, sir.
Q. When was the first time you ever watched for Mr. Frank?
A. The first time I ever watched for Mr. Frank alone and knowed he was in the office——
Q. When was the first time you ever watched for Mr. Frank alone or with somebody else? Don't make any difference.
A. I couldn't exactly give you the——
Q. Tell us the best you can?
A. Some time during last summer, when I was watching for him.
Q. That was the first time, now?
A. Yes, sir.
Q. Whereabouts in the summer; what part of the summer did you do that watching that time?
A. Somewhere about in July.
Q. That's the first time; there was somebody with him that time?
A. Yes, sir. Somebody was with him all the time, off and on.
Q. Let's take the first time, now; what did Mr. Frank say to you that time; what did he say—what did he say to get you to watch for him?
A. I would be there sweeping, and Mr. Frank come out and call me in the office.
Q. What?
A. I would be there sweeping, and Mr. Frank come out and call me in the office.
Q. When was the first time he ever did that?
A. That was on Saturday he done that.
Q. He never had called you in there before when you were sweeping, except on Saturday?
A. He called me in there but never talked to me about that matter.
Q. Did he talk to you about anything?
A. Yes, sir.
Q. About what?
A. Something about the work, something like that.
Q. You mean during the week?
A. No, sir; he talked to me them Saturdays about it.
Q. When was the first time he called you in there to talk about the work or anything else?
A. How do you mean?
Q. On Saturday, when was the first time he called you in there to talk to you about the work or anything else on a Saturday?
A. I don't know about that.
Q. Tell us about that?
A. That was right after I started work there when he called me and talked to me about the work.
Q. And that was on Saturday?
A. Yes, sir; that was on a Saturday.
Q. About what time, now?
A. I don't know, somewheres about three o'clock, though.
Q. Sometime about three o'clock?

A. Yes, sir.
Q. What was your Saturday hours, Jim?
A. I always generally have to work from the time I get back there until half past four that evening.
Q. What time would you usually get back there?
A. I would leave away from there about half past twelve, ring out the clock, and come back about half past one or two o'clock.
Q. Would you ring in again?
A. Yes, sir; sometimes I would and sometimes I wouldn't. * * *
Q. The first time you say you ever watched, you say you watched for Frank and somebody else last July?
A. Yes, sir.
Q. You don't know who the man was?
A. Yes, sir, I know who the man was.
Q. Who was he?
A. A man named Mr. Dalton.
Q. Where is he?
A. I don't know where he is now.
Q. How do you spell that?
A. I don't know how you spell it.
Q. What did he do?
A. A young lady that worked at the factory—I don't know what her name was—she would go off and get him and bring him in there.
Q. You don't know where he lived?
A. No, sir; I don't know where he lived, but I know where she lived.
Q. How come him to tell you who she was?
A. She was the one told me his name.
Q. Where is the young lady?
A. I don't know, sir, if she's anywhere in the room and if she'll stand up I can tell you if it is her.
Q. Give us her name?
A. I don't know, sir, what her name is; the detectives know her name; I don't.
Q. Did the detectives tell you who she was?
A. No, sir; they didn't tell me who she was, I described to them where she lives at.
Q. Where does she live?
A. She lives on West Hunter Street.
Q. Where?
A. Between Hunter and Haynes Street, around about Magnolia street, down there.
Q. How come you to know she lived there?
A. Because I passed her house every morning.
Q. And the man was named Dalton?
A. Yes, sir.
Q. Who was with Mr. Frank?
A. The lady that was with Mr. Frank was Miss Daisy Hopkins.
Q. Where did she live?
A. I don't know sir, where Miss Daisy Hopkins lived.
Q. Where did she work?

A. She worked up on the fourth floor.
Q. Do you know where she is now?
A. No, sir.
Q. Now, what time of day was that?
A. It would always be somewhere about three or three-thirty.
Q. Where did Mr. Frank tell you to watch, that time?
A. I would be up there sweeping, and Mr. Frank——
11 Q. That time—that particular time, I mean?
A. Well, I would be sweeping.
Q. I'm talking about that time—that particular time?
A. When he told me to watch?
Q. Yes, what did he say to you when he told you?
A. I'm going to explain to you now——
Q. That particular time, now?
A. Yes, sir.
Q. Give it to me, now?
A. I would be there sweeping——
Q. Oh, don't give me what you would be doing. I want to know about that particular time?
A. I was at the factory.
Q. Where?
A. Sweeping on the second floor.
Q. Now, what time was that?
A. Somewhere about three o'clock or three thirty.
Q. Somewhere about three or three-thirty?
A. Yes, sir.
Q. Then what happened?
A. Well, there would be one lady in the office.
Q. I am talking about that particular time, Jim—the first time he ever talked to you there, you were in the pencil factory?
A. Yes, sir.
Q. When Mr. Frank called you?
A. Yes, sir.
Q. You were on the second floor?
A. Yes, sir.
Q. Then Mr. Frank called you and then you went to Mr. Frank's office?
A. Yes, sir.
Q. Was there a woman in there with him?
A. Yes, sir, a lady was in there with him.
Q. Called you in the presence of the lady?
A. Yes, sir.
Q. Talked to you in the presence of the lady?
A. Yes, sir, he talked to me in the lady's presence.
Q. And that was Miss Daisy Hopkins?
A. Yes, sir.
Q. And that was about three o'clock?
A. Or half past three.
Q. In July last?
A. Yes, sir.
Q. What did Mr. Frank say to you in that lady's presence? That's

the time (first) time he ever talked to you about that matter, what did he say to you?

A. Yes, sir; he says: "Did you see that lady go out there?"——

Q. Why, I thought you said the lady was present?

A. Yes, sir. That lady was present. He would say: "Did you see that lady go out there?" I say: "Yes, sir," and he says: "You go down there and see nobody don't come up here, and you'll have a chance to make yourself some money."

Q. And the lady was present?

A. Yes, sir.

Q. Where was the other lady?

A. The other lady gone on out and to get that young man.

12 Q. She went with the man?

A. No, sir, she went out by herself to get the man and come back with the man.

Q. How long was she gone?

A. I don't know, sir, how long she was gone.

Q. And that was about half past three?

A. Yes, sir.

Q. The beginning of that transaction was about half past three?

A. Yes, sir.

Q. How long was she gone?

A. I don't know, sir, how long she was gone.

Q. You don't know how long she was gone?

A. No, sir; I don't know how long she was gone.

Q. Was she back after awhile?

A. Yes, sir.

Q. She came back after awhile and brought a man with her, and that man was Dalton?

A. Yes, sir.

Q. And Dalton's name you don't know?

A. Yes, sir; his name was Mr. Dalton.

Q. I know, but you don't know where he lives—nothing of that kind?

A. No, sir.

Q. When this young lady went off and came back and brought Dalton back, where did you see her again?

A. I saw her and Mr. Dalton when they come in at the door.

Q. You were watching then?

A. Yes, sir.

Q. Then where did they go?

A. Upstairs to Mr. Frank's office.

Q. Did you see them go to Mr. Frank's office?

A. I heard them walking in Mr. Frank's office.

Q. Then how long did they stay in Mr. Frank's office?

A. They didn't stay in there long, ten or fifteen minutes, I reckon.

Q. Then where did they go?

A. They came back down, and she says: "All right, James."

Q. Then his name was James Dalton?

A. No, sir; that was talking to me—said all right to me.

Q. You saw them go in the factory and heard them go to Mr. Frank's office, and how long did they stay there?

A. About fifteen minutes I reckon.
Q. Then all of them came down together?
A. No, sir. They didn't all come down together—just this lady and Mr. Dalton.
Q. Then how long before Mr. Frank came down?
A. He was the last one that came down
Q. How long?
A. About an hour after that.
Q. You never heard any of them come out of Mr. Frank's office after they went in?
A. Yes, sir; this lady and this man come back down.
Q. They came back and went down?
A. No, sir; they didn't go out. She came down and say: "All right James," and I would say: "All right; and a place on the first floor that leads into another department, and after you get into this
13 other department, there's a trap door and stairway that leads down in the basement, and they pull out that trap door and go down in the basement.
Q. And that time, she came down and says: "All right, James?"
A. Yes, sir.
Q. She knew you?
A. Yes, sir.
Q. Because she worked in the office?
A. No, sir; she didn't work in the office; she worked on the fourth floor.
Q. Then you went through that door—a door right behind the elevator?
A. No, sir; there isn't a door back of the elevator; there's a big wooden door, just a step there.
Q. I know; but it goes back in the back there?
A. Yes, sir.
Q. Then you opened that door?
A. Yes, sir.
Q. Then came back and opened that trap door?
A. I came and pulled up the trap door.
Q. And then they went down there?
A. Yes, sir.
Q. She said "All right, James?"
A. Yes, sir.
Q. Then you went and opened that door?
A. Yes, sir.
Q. She didn't tell you to open it?
A. Yes, sir; she said, "All right, James"—something like that.
Q. She said "All right," and then you opened the door?
A. Yes, sir.
Q. What made you open the door?
A. Because she said she was ready. I knowed where she was going; Mr. Frank told me to watch.
Q. Mr. Frank told you to watch?
A. Yes, sir.
Q. But he didn't tell you where they were going?

A. Yes, sir, he told me where they were going.
Q. How came him to tell you that?
A. I don't know, sir.
Q. When did he tell you that?
A. That day.
Q. That they were going to the basement?
A. Yes, sir.
Q. That he was going to stay in his office?
A. He didn't say where he was going to stay.
Q. Well, he stayed there?
A. As long as I stayed there I didn't see him go out.
Q. She said all right, and went through that door?
A. Yes, sir.
Q. Opened it and they went down?
A. Yes, sir.
Q. You shut that trap door?
A. Yes, sir.
Q. And that was in July?
A. Yes, sir.
Q. And the first time that ever happened?
A. Yes, sir.
14 Q. First time anybody ever asked you or talked to you about it?
A. Yes, sir.
Q. Now, they went down the basement?
A. Yes, sir.
Q. How long did they stay there?
A. I don't know, sir, how long they stayed there.
Q. What became of them?
A. Well, they came back up.
Q. About what time?
A. I couldn't give no time, because I don't know what time it was when they went down there.
Q. Well, about what time?
A. I don't know, sir; I couldn't give you what time they came back up.
Q. It was after 3:30 when this whole thing started?
A. Yes, sir, it was after 3:30 when this whole thing started.
Q. He told you to go down; they came up after a while?
A. Yes, sir, they came up after a while.
Q. Came up the same way they went down?
A. Yes, sir.
Q. Up through the same door?
A. Yes, sir.
Q. You kept that door locked all the time?
A. No, sir, I didn't keep it locked; I just kept it shut and stayed there by it.
Q. Stayed there the whole time?
A. Yes, sir.
Q. And never left?
A. No, sir.

Q. Well, what did they do after they came up through the door?
A. After they came up through the door me and Mr. Dalton stood and talked at the steps. Mr. Dalton gave me a quarter and he went out laughing, and she went up the steps.
Q. Where did she go?
A. She went and stood at the top of the steps a little while first, before she ever went to the office.
Q. Did she go to the office?
A. Yes, sir, she went to the office.
Q. How do you know she did; you couldn't see her go there, could you?
A. No, sir, I couldn't see her go in the office, but I could hear her go there. I heard her walking in there.
Q. How long did they stay before they came down?
A. Didn't stay very long before they came down.
Q. What next happened?
A. They came down and left, and then Mr. Frank come down after they left away.
Q. What time did Mr. Frank leave?
A. I don't know, sir, what time Mr. Frank left——
Q. Give us the best you can?
A. Frank left some time about half past four, I believe.
Q. Then they stayed there an hour?
A. I don't know sir; I guess so.
Q. Then Mr. Frank left, and you locked the door and you left?
A. No, sir, I left before he did. He came down and gave me a quarter out of his pocket. He says: "Is that all right?" and I says, "That's all right," and then left.
15 Q. Then he came out behind you and left?
A. Yes, sir.
Q. Now, that's the first time?
A. Yes, sir.
Q. Now, when was the next Saturday?
A. The next Saturday was mighty near the same thing.
Q. Well, what was the next Saturday; I didn't ask you whether it was the same thing or not?
A. That was about two weeks after that.
Q. Was that in August or in July?
A. Well, it was about the last of July or the first of August.
Q. Well, do you remember the date?
A. No, sir, I don't remember the date at all.
Q. Where did you get your money that time; did you draw it?
A. Yes, sir, I drawed my money that time.
Q. Go up and draw it yourself?
A. I disremember whether I drawed it myself or not.
Q. Can't remember anything about that?
A. No, sir.
Q. The first time it happened, did you draw it yourself?
A. I can't remember whether I did or not.
Q. You can't remember that?
A. No, sir.

Q. Tell us the next Saturday. You think it was about two weeks after that?
A. Yes, sir.
Q. Now, when did Mr. Frank first mention it to you that Saturday? When did he first mention it, that Saturday, to you?
A. Mr. Frank mentioned it to me the same Saturday I was there.
Q. About three o'clock?
A. I don't know, sir, what time it was.
Q. About half past two, was it?
A. About half past two, I guess, that Saturday.
Q. About half past two, you think, that Saturday?
A. Yes, sir.
Q. Where were you then?
A. At the factory.
Q. Where?
A. I was through sweeping, up on the fourth floor.
Q. Mr. Frank came and got you?
A. No, sir, he told me that morning before ever they paid off.
Q. What time was that he told you?
A. I don't know, sir, it was near twelve o'clock when he did tell me.
Q. Where did he tell you that?
A. In the box room.
Q. Anybody else present?
A. No, sir, not as I knows of.
Q. What were you doing in there?
A. What was I doing in there, I was looking after the boxes.
Q. What did he tell you then?
A. He told me: "Now you know what you done for me last Saturday——"
Q. He told you: "You know what you done for me last Saturday?"
A. The other Saturday. I says: "Yes, sir, I remember." He says: "I want to put you wise to this Saturday." I says: "All right, sir, what time?" He says: "Oh, about half past" (?) I says: "All right, sir."
16 Q. You remember that distinctly?
A. Yes, sir.
Q. What time did he go to dinner that day?
A. I don't know, sir, what time he went to dinner that day; I wasn't there when he went to dinner.
Q. What time did he get back that day?
A. That was somewhere about quarter past two. I saw him going up the steps with his clothes and his hat on. I don't know where he had been.
Q. What was the next that happened?
A. He went in his office next that happened.
Q. Then what was the next that happened?
A. Mr. Holloway, he came on out.
Q. Mr. Holloway was there?
A. Yes, sir.

Q. That was half past two o'clock?
A. No, sir, it wasn't half past two.
Q. I thought you said he always left about half past two?
A. No, sir, I didn't say he always done it.
Q. Now, when was that; give us the best estimate about it?
A. It's pretty hard to give the best estimate about the time, because I wasn't looking at the clock at all.
Q. What was the next?
A. After Mr. Holloway left away Miss Daisy Hopkins come on in there.
Q. What happened next?
A. She came into his office.
Q. You heard her come into his office?
A. I saw her that time.
Q. Did she see you?
A. Yes, sir.
Q. Then what happened?
A. Well, Mr. Frank come out and popped his finger and bowed his head like that and went back in the office.
Q. Where were you at?
A. I was standing there by the clock.
Q. He popped his hand?
A. No, sir, he popped his finger.
Q. He popped his finger and bowed to you?
A. Yes, sir.
Q. Then you went down?
A. Yes, sir, then I went down.
Q. And you stood by the door?
A. Yes, sir.
Q. Didn't lock it?
A. No, sir, I didn't lock it; I shut it.
Q. Then what next happened?
A. I don't know, sir, what next happened.
Q. Did you hear Mr. Frank come out of his office at all?
A. No, sir, I didn't hear Mr. Frank come out of his office at all.
Q. You could have heard him if he went out?
A. No, sir, I couldn't have heard him if he went out.
Q. Well, how comes it you could hear him go in there and not hear him come out?
A. Because I was up there on the floor when she went in there, in the office.
17 Q. When you went down, she was in Mr. Frank's office?
A. No, sir, I was standing at the clock and saw her go into Mr. Frank's office.
Q. Then you went down and watched?
A. Yes, sir, I went down and watched.
Q. Did you hear her come out of his office?
A. No, sir.
Q. Didn't you say a while ago that, while you were at the door, you heard these other people coming out of his office?

A. No, sir, I said this—this was what I said: after I got to the top of the steps I could hear them going into his office.

Q. I know but you said this lady went and got a fellow; you stood by the door and heard them going into his office.

A. No, sir, I said her and this man's footsteps I heard them go into Mr. Frank's office. I said I stood down at the door and watched.

Q. You were watching when they came in, didn't you say?

A. Yes, sir, I said I was watching when they came in.

Q. You could see them when they came in there?

A. Yes, sir, I could see them when they came in there, and I said I went up and heard the footsteps going in Mr. Frank's office.

Q. Didn't you sit there and watch all the time?

A. I didn't sit there at the door until he notified me to do that.

Q. I'm talking about the time she went and got that man and came back?

A. I was standing by the door, yes, sir.

Q. Stood there from that on?

A. No, sir. I didn't stand there from that on.

Q. What did you do?

A. I stood there about the trash barrel then.

Q. On the first floor?

A. Right there by the side.

Q. And then you heard them going back?

A. I heard them go to Mr. Frank's office, yes, sir.

Q. When you were standing at the door, you couldn't see them going into Mr. Frank's office?

A. No, sir, I couldn't see them go into Mr. Frank's office.

Q. Wasn't you at Mr. Frank's office at that time?

A. Not at the door, no sir, when you are at the door you ain't there at Mr. Frank's office.

Q. When do you hit his office?

A. When you hit that trash barrel.

Q. Now, did anybody else come that day?

A. This second time?

Q. Yes.

A. No, sir, nobody else didn't come.

Q. How long did Mr. Frank stay there that time?

A. I don't know, sir, how long he stayed there that time.

Q. About how long?

A. Staved there that time about a half an hour, I reckon—something like that.

Q. Then the girl went out?

A. Yes, sir; then the girl went out.

Q. Mr. Frank came and went out?

A. No, sir, he called me up there then, asked me was I there; I told him yes sir, I was about through now.

18 Q. Did he know whether you were through or not?

A. I don't know, sir, whether he did or not.

Q. He gave you some money?

A. He gave me half a dollar.

Q. And the other time they didn't give you but a quarter.

. ——.

Q. Then you left?

A. Yes, sir.

Q. Give the next time?

A. Pretty hard for me to remember.

Q. It was Thanksgiving Day, the next time, wasn't it?

A. No, sir, it wasn't Thanksgiving Day, the next time; I had watched for him and Mr. Dalton, too, before that Thanksgiving Day.

Q. Give us the best you can, of the next time?

A. That was somewhere along in the winter time; I don't know, sir, the exact time.

Q. Well, Thanksgiving time is winter time, ain't it, Jim?

A. Yes, sir, but this is before Thanksgiving.

Q. How many times before Thanksgiving?

A. I watched for him three times before Thanksgiving day.

Q. Well, you've given me two of these times?

A. Yes, sir.

Q. When was the next one—about when?

A. I don't know, sir; I couldn't exactly tell. Somewhere about the middle of August, I guess, or the last part of August.

Q. You said it was winter, didn't you?

A. Well, that's somewhere near the winter, ain't it?

Q. Mighty cold about the middle of August, ain't it?

A. I said it was somewhere——

Q. Beginning to be mighty cold about the middle of August, ain't it?

A. No, sir, not so cold.

Q. Pretty cold, though, ain't it?

A. No, sir, not so cold.

Q. But it's obliged to be cold, though, ain't it?

A. No, sir, not so cold.

Q. Pretty cool though?

A. No, sir, not so cold. Some days is cool.

Q. What made you say it was near winter, though, Jim?

A. It's near winter.

Q. All right, how did that happen? Just give it to me like it happened. What time did that happen?

A. I don't know, sir, what time it was that it happened.

Q. About what time?

A. Sometime after Mr. Frank come back from dinner; I don't know what time it was.

Q. About what time?

A. I don't know, sir.

Q. What did he tell you—he wanted you to watch that time?

A. He told me that time on the fourth floor.

Q. What time was that?

A. This was somewhere—I don't know, sir, what time; I couldn't exactly tell.

Q. It was morning or evening?

A. It was in the evening.
Q. About what time?
A. I don't know, sir, I couldn't tell you exactly.
19 Q. Where was you when he told you?
A. Right at the elevator.
Q. Was it before twelve o'clock?
A. I don't know, sir, whether it was twelve o'clock or not.
Q. After twelve?
A. I don't know whether it was after twelve or not.
Q. You don't know anything about that; you can't remember that?
A. No, sir.
Q. Anybody standing around there then?
A. There was Gordon Bailey standing there.
Q. That's Snowball?
A. Yes, sir.
Q. Anybody else there?
A. Not to my knowing, it wasn't.
Q. Wasn't the office force there at that time?
A. They were not standing at the elevator; they were back at work.
Q. It must have been before twelve o'clock then, if they were back at work?
A. I guess so; I don't know whether it was twelve or not.
Q. What did he tell you then?
A. He told me: "I want to put you wise again for to-day."
Q. "I want to put you wise again for to-day?"
A. Yes, sir.
Q. That is the same words he used every time?
A. He didn't use that every time, but he used that more often than anything else.
Q. What else did he say. He hadn't seen you but three times; hadn't watched for him but three times—two times before that?
A. Yes, sir.
Q. You say that's the word he usually used?
A. I don't know about the usual, but he used that the other two times.
Q. Up to that time he used the same words every time, that: "I want to put you wise." Is that correct?
A. Yes, sir, but he said sometimes in a funny way——
Q. Well, sometimes. But you said you hadn't watched but three times; and every time he said then: "I want to put you wise." He done that, didn't he, Jim?
A. And he would say that and say it in another way, too?
Q. But the three times, he said: "I want to put you wise?"
A. Yes sir, the three times he said: "I want to put you wise."
Q. And that was the three times—say it the three times up to that time?
A. Well, yes sir, to my remembrance it was.
Q. You don't know that then?
A. No, sir, I don't know that.

Q. Well, you said that though?
A. Yes, sir. I said it.
Q. Did he say anything else to you but "I want to put you wise" at that time and place?
A. Yes, sir, "I want to put you wise like I been doing the other Saturdays down there." I said: "All right, sir."
Q. All right, now, what time did that happen?
A. Well, just happen in the evening.
Q. About what time?
A. I don't know, sir, what time it happen.
Q. Give us the best estimate you have got?
A. Well, some time half past, I reckon.
Q. Sometime half past; half past what—half past two or half past three?
A. It was half past two, I reckon.
Q. He came back you say. What made him come; did he come back and hunt you?
A. No, sir, he didn't hunt me.
Q. Where were you?
A. I was standing by the office when he got there.
Q. Then he came in there with you?
A. Yes, sir.
Q. What did he say to you?
A. He told me, he says: "She be here in a minute."
Q. Then where did you go?
A. I stayed there at the office.
Q. Did you see her come in there?
A. Yes, sir; I seed her come in there.
Q. Who was she?
A. She was a lady what worked on the fourth floor, but I don't know her name.
Q. The same woman?
A. No, sir, she's not the same woman.
Q. Miss Daisy had been there twice, and this was a new woman?
A. Yes, sir.
Q. Does she work there now?
A. I don't know, sir, whether she is or not. I'm not working there, and I don't know who all's working there now.
Q. What kind of looking lady was she?
A. Nice looking lady, kinder slim.
Q. What kind of eyes did she have?
A. I don't know, sir, I never paid no attention to her eyes.
Q. What kind of hair?
A. I don't know, sir, exactly—had hair like Mr. Hooper there got.
Q. How do you know Mr. Hooper so well; you seem to know him pretty well, don't you, Jim?
A. No sir. I don't know, sir; I have seen Mr. Hooper before.
Q. He had a good deal to do with you down there?
A. No sir; I seen him once when he come down to the cell to see me.

Q. Was she grey haired, like Hooper—you say she had hair like Hooper's?

A. Yes, sir, she had hair like Mr. Hooper's.

Q. Ain't that a grey-headed fellow, sorter measley and broken down with age?

A. Don't look like he's grey to me.

Q. You have been right close to him, too, haven't you?

A. I have been right close to him, but not to pay no attention to his hair.

Q. Well, she had hair like Hooper?

A. Yes, sir.

Q. If he's grey-haired, she had too?

A. Well, she had hair like Mr. Hooper's.

Q. Was she blonde or brunette?

A. I don't know, sir, what you mean by that?

Q. You don't know what a blonde is?

A. No, sir.

21 Q. You don't know what a brunette is?

A. No, sir.

Q. Did she have light hair?

A. She had hair like Mr. Hooper's.

Q. What sort of clothes did she have on?

A. She had on a green suit of clothes.

Q. Green all over?

A. As far as I could see.

Q. What kind of shoes and stockings did she have on?

A. I didn't pay no attention to her shoes and stockings.

Q. But Miss Daisy Hopkins, what sort of clothes did she have on the first time she came down there?

A. The first time that she came there she had on a black skirt and a white waist.

Q. What kind of shoes and stockings?

A. I didn't pay no attention to what kind of shoes and stockings she had on.

Q. Didn't you tell Mr. Dorsey what kind of shoes and stockings she had on?

A. No, sir, I told him the lady that was there Thanksgiving Day had on white shoes and stockings.

Q. Now the next day what did she have on?

A. The next day she had on the same thing, black skirt and white waist.

Q. She had on exactly the same thing?

A. Yes, sir.

Q. And this other—there was a girl dressed in green all over?

A. Yes, sir, there was a girl dressed in green all over, this last one.

Q. And you don't know who she is?

A. No, sir she worked up there on the fourth floor, but I don't know her name.

Q. You don't know whether she works there now or not?

A. No, sir, I don't know whether she works there now or not. I haven't been there——

Q. She worked there when you left?

A. She had been there that morning; I don't know whether she was there that evening.

Q. And you saw her there?

A. Yes, sir.

Q. Did she have on a green dress that morning?

A. No sir, she didn't have on a green dress that morning.

Q. What kind?

A. A dirty black dress with paints on it.

Q. Well, they all have that, don't they?

A. Yes, sir, when they are at work.

Q. You didn't see her when she had her working dress off?

A. No, sir, I didn't see her that day when she had her working dress off.

Q. You never inquired who she was?

A. No, sir, I never inquired who she was because it wasn't none of my business.

Q. Did she speak to you?

A. No, sir.

Q. Well, she's the one, anyway?

A. Yes, sir.

Q. She was the other one?

A. Yes, sir.

22 Q. Now, Jim, don't everybody in that factory know Jim Conley?

A. No, sir, didn't everybody in that factory know me.

Q. Give me one of them?

A. I don't know, sir, I don't know whether they all knew me or not.

Q. Didn't the lady go up and down on the elevator at all?

A. No, sir, the girls never did.

Q. You swept on the fourth floor?

A. Yes, sir, I swept on the fourth floor a while.

Q. How long did you sweep on the fourth floor?

A. Been sweeping up there ever since last January.

Q. You saw that little girl every day, that went to meet Mr. Frank, didn't you?

A. This last one?

Q. Yes?

A. I didn't see her every day, but I seen her there.

Q. Saw her many times and didn't ask her who she was?

A. No, sir, I didn't ask who she was.

Q. Don't know who she was?

A. No, sir, I don't know who she was.

Q. Now, when she came in, did she see you when she came in?

A. Yes, sir, she seen me when she come in.

Q. Where did she go?

A. She went to Mr. Frank's office.

Q. Then you went and watched?

A. Yes, sir, then I went and watched.

Q. You didn't see them leave nor hear them leave Mr. Frank's office?

A. No, sir, I didn't see them leave and I didn't hear them leave Mr. Frank's office.

Q. How long did you stay there?

A. Half an hour, I reckon.

Q. And she came out?

A. Yes, sir.

Q. What became of Mr. Frank?

A. He came out and left me up in the office and he went out somewhere, I don't know where he went, and then he came back and says: "That's all right, I didn't take out any money."

Q. He went out somewhere?

A. Yes, sir.

Q. You mean he went out in town somewhere?

A. I don't know whether he went out in town or not.

Q. Didn't you open the door?

A. Yes, sir, I opened the door.

Q. Well, he went out of the factory?

A. Yes, sir.

Q. And then went back?

A. Yes, sir.

Q. And you stayed there waiting for him?

A. Yes, sir.

Q. What did you say he said?

A. He said: "I didn't take out that money, didn't you see I didn't?" I says: "Yes, sir, I seed you didn't." He said: "That's all right, old boy, I don't want you to have anything to say to Mr. Herbert or Mr. Darley about what's going on around here."

Q. He told you he didn't want you to tell Darley?

A. Yes, sir.

23 Q. And then the next time, now, was Thanksgiving Day?

A. Yes, sir, the next time was Thanksgiving Day?

Q. What hour was it Thanksgiving Day?

A. I don't know sir, what hour; I met Mr. Frank there that morning about eight o'clock.

Q. Anybody else there?

A. I didn't see anybody else there.

Q. Where did you meet him, then?

A. I met Mr. Frank right at the door; I was sitting on the box when he come in.

Q. That's when he mentioned it to you again?

A. That's when he taken me on the inside and told me——

Q. Tell me the words.

A. After he went on the inside, he says: "How are you feeling?" I says: "I'm feeling all right, Mr. Frank." He says: "Come here," he says, "a lady will be here a little while, me and her going to chat. I don't want you to do no work; I just want you to watch?"

Q. About what time was that?

A. Somewhere between eight and half past eight.

Q. Nobody there then?
A. I didn't see nobody.
Q. Where did you go then?
A. He went upstairs.
Q. He went upstairs?
A. Yes, sir.
Q. Where did you go?
A. I stayed down on the first floor.
Q. How long was it before the lady came?
A. I don't know, sir, somewhere about half an hour.
Q. Something about nine o'clock, that morning?
A. I don't know, sir, what time it was; it was about half a hour.
Q. Well, you said you got there about half past eight?
A. I said somewhere about eight and half past eight.
Q. Well a half hour, then, would be somewhere between half past eight and nine, the lady came?
A. Yes, sir, it was a half hour.
Q. Did you know that lady?
A. No, sir, I didn't know that lady. I had never seen her around the factory.
Q. She had never worked there?
A. No, sir.
Q. And you never saw her before nor since?
A. I think I saw her in the factory two or three nights before the Thanksgiving Day, in there in Mr. Frank's office.
Q. You didn't have any talk with her that night?
A. No, sir.
Q. Nor with Mr. Frank either?
A. No, sir; I had some talk with Mr. Frank about explaining about that clock.
Q. But about the lady?
A. No, sir, didn't say nothing at all about the lady.
Q. Now, you had, you say, seen her there a few nights before?
A. Yes, sir.
Q. Sitting in Mr. Frank's office, was she?
A. Yes, sir.
24 Q. What time?
A. Somewhere near eight o'clock.
Q. What did you have to do there?
A. I had to stack some boxes up on the fourth floor.
Q. Eighth floor? You had to stack some boxes?
A. No, sir, I said fourth floor.
Q. That was about Thanksgiving Day?
A. Yes, sir.
Q. Was it the same week of Thanksgiving you saw her up there?
A. I don't know, sir, whether it was the same week of Thanksgiving, but somewhere near Thanksgiving; it wasn't many days.
Q. How was she dressed that night?
A. I disremember how she was dressed that night.
Q. What sort of looking face did she have?
A. She was a nice looking lady.

Q. What kind of hair did she have?
A I didn't pay no attention, because I didn't go that close.
Q. What sort of complexion?
A. I don't know, sir, I didn't get that close.
Q. You don't know what sort of clothes, nor what sort of shoes?
A. I think she had on black clothes?
Q. How tall was she?
A. She was a very tall, heavy built lady.
Q. You are certain of that?
A. Yes, sir.
Q. Then, between half past eight and nine, she came to the factory?
A. Yes, sir, between half past eight and nine o'clock.
Q. Where were you?
A. I was standing down on the first floor.
Q. Standing down on the first floor?
A. Yes, sir.
Q. Was the door open when she came?
A. The front door was open when she came.
Q. You closed it?
A. I closed it after he stamped for me to close it.
Q. He stamped that time?
A. Yes, sir.
Q. He didn't do it before?
A. No, sir, because I would be down there and know.
Q. You heard her go into his room?
A. Yes, sir, I heard her go (into his office).
Q. Where was he standing?
A. Standing by the trash barrel, smoking a cigrette.
Q. She went upstairs and went into Mr. Frank's office, and you heard her?
A. I heard her going towards Mr. Frank's office.
Q. You heard her go in there?
A. I couldn't hear them go in; I heard her going towards it.
Q. Didn't you say you heard those others go in?
A. No, sir, I said I heard them going towards the office.
Q. You didn't say you saw them go in?
A. No, sir, I said I heard them go toward it.
Q. And you didn't say you heard them go in?
A. No, sir, I said I heard them go towards the office.
Q. You didn't say you saw them go in?
A. No, sir, I said I heard them go towards it.
Q. And you didn't say you heard them go in?
A. No, sir, I said I heard them go towards his office.
Q. But you didn't see the others?
A. I don't remember saying I seen the others.
Q. Now she came, and she went up and went towards Mr. Frank's office, and he stamped?
A. Mr. Frank came out there and stamped.
Q. Where did he come to and stamp?
A. Came to the trash barrel where he told me——

Q. You mean upstairs?
A. Yes, sir, he was up on the second floor stamping.
Q. And you were on the first floor?
A. Right about the trash barrel.
Q. And you were on the first floor?
A. Right about the trash barrel.
Q. And he told you he was going to stamp?
A. Yes, sir, two times.
Q. And then he stamped?
A. Yes, sir.
Q. And then you closed the door?
A. Yes, sir, like he said so.
Q. How long did you stay there?
A. I didn't stand in the door after I closed the door. I came back and sat down on the box.
Q. How long did you stay there?
A. About a hour and a half.
Q. That would have been until about 10:30—about 10 o'clock that you stayed there?
A. I reckon so; I don't know how long exactly it was.
Q. Then the lady came down?
A. No, sir, Mr. Frank says; "I'll stamp after this lady comes, and you go and close the door and turn that night latch."
Q. That was the first time he ever told you about the night lock?
A. Yes, sir.
Q. The other times, he told you just to close it?
A. Yes, sir.
Q. But that time he told you to put the night lock on?
A. Yes, sir; and he says: "I'll stamp, and if everything is all right, you take and kick against the door?"
Q. And that time you kicked against the door?
A. Yes, sir, I kicked on the door.
Q. You didn't kick against the door the other times?
A. No, sir, because the ladies always went upstairs——
Q. Well, she went up then, too, didn't she?
A. Yes, sir.
Q. But he told you to stamp and everything would be all right?
A. No, sir, he didn't tell me to stamp and everything would be all right, he didn't say that. He said he would stamp, and for me to kick the elevator door if everything was all right.
Q. And then you stayed an hour and a half that time?
A. Yes, sir.
26 Q. Then the lady came down?
A. No, sir, Mr. Frank come down——
Q. He left the lady up there?
A. No, sir, Mr. Frank some down to the two doors and unlocked the doors and went on—come back, and says: "Everything all right?" I says: "Yes, sir." He went to the front door and fixed it hisself, unlocked the front door hisself, he went and looked up the street like that (illustrating) and come to the steps and taken

the knob and turned it, there at the head of the stair door, and told her to "come on."

Q. He turned the knob and told her to come on down?

A. Went to the stair doors.

Q. Told her to come down?

A. Yes, sir.

Q. And she left?

A. No, sir, she come down; and after she got to me, she says to Mr. Frank, "Is that the nigger?"; and he says: "Yes"; and she says: "Well, does he talk much"; and he says: "No, he's the best nigger I've ever seen."

Q. She stopped there and looked at you?

A. No, sir.

Q. Didn't you say she stopped and asked Mr. Frank: "Is that the nigger?"

A. She asked Mr. Frank that.

Q. She stopped and said to Mr. Frank: "Is that the nigger?"

A. No, sir, she didn't stop.

Q. She just kept walking?

A. Yes, sir.

Q. Neither stopped, neither of them stopped?

A. No, sir, neither of them stopped at all; she just said that——

Q. Said: "Is that the nigger," and just kept walking on?

A. Yes, sir, she kept on walking.

Q. And kept on walking off?

A. Yes, sir, she kept on walking, and——

Q. Just kept on walking, and Mr. Frank said: "Yes, that's the best nigger I ever saw?"

A. Yes, sir.

Q. You didn't see them stop at all?

A. No, sir, I didn't see them stop at all.

Q. Went out together?

A. No, sir, they never went out together.

Q. What did Mr. Frank do then?

A. Mr. Frank went up and opened the door and come back up stairs.

Q. How long did he stay there?

A. I don't know sir, how long he stayed there.

Q. You left there?

A. He told me to go back in the office——

Q. You went in the office?

A. Yes, sir; he called me. I went in the office, and Mr. Frank come and gave me a dollar and a quarter.

Q. Gave you $1.25 that time?

A. Yes, sir, he gave me $1.25 that time.

Q. You went out then?

A. No, sir, I stayed there a little bit. He asked me where I was going that day. I says: I ain't going nowhere; I'm going home." He says: "I'm going home directly too." I says: "Is that all, Mr. Frank." He says: "Yes," and I left away.

27 Q. Where did you go when you left?
A. I went to the beer saloon over there on Hunter and Forsyth Street.
Q. How long did you stay there?
A. I don't know, sir; about an hour, I reckon.
Q. Then went home?
A. No, sir, I went to Peters Street and stayed a good while.
Q. Drank some more beer over there?
A. No, sir, I didn't drink no beer over there?
Q. Didn't drink but one beer that day?
A. I don't know, sir, how many I drank at that saloon on Forsyth and Hunter.
Q. About what time did you leave the factory?
A. I don't know, sir, it was a little before twelve o'clock, but I don't know what time.
Q. So the girl didn't come out of the factory that day until a little before twelve o'clock?
A. I don't know, sir, what time she come out of the factory that day.
Q. You said you saw her leave?
A. I said she staid about an hour and a half.
Q. Well, what time did she leave?
A. I don't know, sir, what time.
Q. What kind of dress did she have on?
A. Blue skirt with white dots in it.
Q. She had on a blue skirt with white dots in it?
A. Yes, sir, and white slippers and white stockings, and had a grey tailor-made coat—what I call a grey tailor-made coat—looked to me like with pieces of velvet on the edges of it.
Q. What kind of velvet was it?
A. Black velvet.
Q. What color was the cloth that made the coat?
A. It was grey.
Q. Did she have on any jewelry?
A. I didn't notice her hands.
Q. What sort of a hat?
A. Hand a black hat, with big black feathers over.
Q. What else?
A. That's all I paid any attention to.
Q. She had white shoes and white stockings?
A. Yes, sir.
Q. Then Mr. Frank said he was going to dinner, and you didn't go back any more that day?
A. No, sir, I didn't go back any more that day; I left him there at the office.
Q. You left him at about twelve o'clock?
A. Yes, sir, a little before that.
Q. And wasn't anybody else there that day?
A. No sir, not while I was at the office, I didn't see nobody else there that day.
Q. The next time, now?
A. Next time was Saturday when I watched.

Q. How long was that after Thanksgiving?
A. That's somewhere after Christmas, way after Christmas, when I watched for him.
28 Q. That was in the dead of winter, then?
A. Yes, sir, in the dead of winter.
Q. About when?
A. About January, I reckon.
Q. About the middle of January, or when?
A. I don't know, middle, first or last, I can't say—somewhere in January.
Q. How do you know it was somewhere in January?
A. Because it was right after the first of the year.
Q. Well, if it was right after the first of the year, you know what time it was in January?
A. I said somewhere about the first or middle.
Q. Well, was it in middle, or first, or last?
A. I don't know, sir, somewhere one of them parts; it was right after New Year, I don't know whether one or two days after.
Q. You couldn't tell any better than that?
A. No, sir, I couldn't tell any better than that?
Q. That was another Saturday?
A. Yes, sir, that was another Saturday.
Q. When did he first talk to you about that?
A. Well, I disremember when he first talked to me about that.
Q. You don't remember what he said to you?
A. No sir, I don't remember what he said to me.
Q. But you know you were down there watching; that's the only thing you can remember about that?
A. I can remember one thing,— He said——
Q. You said a minute ago you couldn't remember anything.
A. I couldn't remember anything about him telling me about the watching, but I can remember about him telling me about who was coming.
Q. What did he tell you?
A. Said it — be a young man with two ladies.
Q. When did he tell you that?
A. That was Saturday morning.
Q. What time?
A. Soon Saturday morning.
Q. About what time?
A. I reckon about half past seven o'clock.
Q. Was Mr. Holloway there at that time?
A. No, sir, I had seen him, but I was on the elevator.
Q. He came and got on the elevator with you?
A. No, sir, I was standing by the side of Gordon Bailey, and he come and told me.
Q. You can't remember what he told you except he was going to have a man and two ladies after awhile?
A. Said: "A man and two ladies will be there this evening," and said I may can make some money off this man.
Q. Said what?

A. That I could get to make a piece of money off this man.
Q. That was all he said to you about that?
A. Yes, sir.
Q. Didn't tell you when they would come?
A. Said be there this evening about the same time.
Q. You didn't say that awhile ago when I asked you what he said, did you?
A. You cut me off so quick I didn't have time to say it.
29 Q. Well, I'm sorry I cut you off, I'll open it again and give you a better chance. That was about half past seven?
A. Yes, sir.
Q. What floor of the factory?
A. I can't remember now just what floor it was on.
Q. You didn't see anybody at the time, except Mr. Holloway?
A. I saw Gordon Bailey; me and him was on the elevator together.
Q. He was talking to you so Gordon Bailey could hear him?
A. I don't know, sir, I reckon he could hear; he was talking so he could hear.
Q. He was talking so Snowball could hear it?
A. Yes, sir.
Q. Just talking to you about meeting a woman and let Gordon hear it?
A. He said them words, yes sir.
Q. Right before Gordon?
A. Yes, sir.
Q. And you remember what floor it was on?
A. No, sir, I don't remember what floor it was on.
Q. He didn't say anything more to you after that?
A. No, sir, he didn't say anything more to me after that.
Q. Then what did you do that evening?
A. I went and got through cleaning up about quarter after two, and I went and stood at the door.
Q. He hadn't told you to stay at the door—just told you some woman was coming?
A. Told me two ladies and a young man coming, and I could make myself some money off this man.
Q. All right. Then you went and stood at the door.
A. Yes, sir.
Q. Was the door open?
A. One door was.
Q. Broad, open daylight?
A. Yes, sir.
Q. What time did the man and the ladies come?
A. Somewhere about half past two or three o'clock.
Q. About half past two or three o'clock they came?
A. Yes, sir.
Q. They come right in?
A. No, sir, they didn't come right in. The two ladies stayed back; the young man, he come in. He asked me was Mr. Frank in the office; he says: "Mr. Frank put you wise?" I says, "Mr. Frank put me wise, how?" He says: "Didn't he tell you to watch

the door, two ladies and a young man would be here?" I says: "He didn't tell me to watch the door." He says "Two ladies and a young man would be here," and, he says, "Well, I'm the one."

Q. Him and Mr. Frank used the same terms, then. Frank says: "I'll put you wise;" and he said: "I'll put you wise"?

A. Mr. Frank didn't say it that day.

Q. Well, but he said it the other times?

A. Yes, sir.

Q. And the two ladies stayed out there and talked to you?

A. Yes, sir; then he come and told them to come on.

30 Q. They went up to Mr. Frank's office?

A. I don't know, sir, where they went after that, after they went upstairs, I don't know where they went after they got upstairs.

Q. You were near enough, wasn't you, to see?

A. No, sir, I was at the door.

Q. You don't know which way they went?

A. I saw them when they turned that way, towards the clock.

Q. You say it was about half past two?

A. Yes, sir, it was about half past two or three o'clock.

Q. How long did they stay there that time?

A. Stayed there, looked like to me, about two hours, I reckon.

Q. Then half past two and that would make it half past four o'clock?

A. I don't know, sir, what time it would make it.

Q. Did you lock the door?

A. No, sir, I stood just inside the door.

Q. Nobody came in while you were there and nobody came out?

A. No, sir, didn't anybody come in while I was there and didn't nobody come out.

Q. Did you know either one of those ladies?

A. No, sir, I didn't know either one of those ladies.

Q. Give me a description of those young ladies?

A. Well, I disremember what the ladies did have on.

Q. Can't you remember what either of them had on?

A. No, sir, I can't remember what either of them had on; I didn't pay much attention.

Q. Can't describe either one of those women at all, can you?

A. No, sir.

Q. What sort of looking man was he?

A. He was tall, slim built, heavy man.

Q. Ever see him before?

A. I have seen him there talking to Mr. Holloway.

Q. Did he work there?

A. No, sir, he didn't work there.

Q. When did you ever see him there talking to Mr. Holloway?

A. Seen him quite often talking to Mr. Holloway through the week.

Q. Seen him quite often?

A. Yes, sir.

Q. Quite often?

A. Yes, sir, through the week, come there talking to Mr. Holloway.

Q. Give us a description of him?

A. Well, I said he was a tall man.

Q. Well, did he have black hair?

A. I couldn't see his hair; he had on a hat.

Q. Had light eyes?

A. I don't know, sir, what you mean by that.

Q. Did he have grey eyes or blue or black?

A. I didn't pay much attention to his eyes.

Q. You had seen him there frequently talking to Mr. Holloway, though?

A. Yes, sir.

Q. Where did he talk to Mr. Holloway at?

A. Sitting out on the bench up there.

Q. Did you hear any conversation between him and Mr. Holloway?

A. No, sir, I couldn't hear anything between them.

31 Q. Ever seen him since then?

A. I seen him since he was talking to Mr. Holloway then.

Q. But you don't know who he was?

A. No, sir.

Q. Ever saw the girl before or since?

A. No, sir, never saw the girls before or since, to my remembrance I haven't.

Q. Now, Jim, you were talking to me when we left off about the time you say you watched for Mr. Frank.

A. Yes, sir.

Q. Did you watch for him again?

A. In January, yes sir.

Q. Well I am talking about January. Is that the last time you watched for him until this time?

A. Yes, sir, I think it was—if I am not mistaken.

Q. Well, you ain't mistaken about it, are you Jim?

A. I don't know, sir, I couldn't tell you about that.

Q. You have no recollection of any other time?

A. No sir, no recollection of any other time.

Q. You have got no recollection, you can't remember it, if you did?

A. Well, I don't know, sir——

Q. Now let us take that time about the middle of July you say you watched for him the first itme. What did you do the Saturday before you watched for him the first time?

A. The Saturday before I watched for him the first time?

Q. Yes?

A. I disremember now, went ahead with my work, I guess.

Q. You have no recollection of that at all?

A. No, sir.

Q. Now, let us take the Saturday before you say you watched for him, what did you do that Saturday?

A. Well, I thought you said to take the Saturday before I had watched for him.

Q. Well, I did, and I will now take the Saturday after you watched for him the first time?

A. Well, the Saturday I watched for him the first time—I disremember.

Q. You can't remember what happened that day?

A. No, sir.

Q. Nothing on that day?

A. No, sir.

Q. Well, the next Saturday?

A. Well, I watched for him that Saturday.

Q. You say you didn't watch for him until three weeks?

A. That would make three weeks.

Q. One Saturday and two Saturdays make three?

A. That is what I call three, three times that I watched for him.

Q. One Saturday would be one week?

A. Yes, sir.

Q. The next Saturday would be two weeks?

A. Yes, sir.

Q. And the next Saturday would be three weeks?

A. Yes, sir, and the next Saturday would be three weeks.

32 Q. But I am not asking about that. I am talking about the second Saturday?

A. You asked me what I did the second Saturday, well, I don't remember.

Q. You mean you watched for him one Saturday and then the second Saturday you watched for him again?

A. Then the second Saturday after that I watched for him.

Q. You missed a Saturday?

A. Yes, sir.

Q. And then you watched the next Saturday?

A. Yes, sir.

Q. That is what you say about it now?

A. Yes, sir, that is what I say about it now and what I said before.

Q. Now the Saturday after you watched for him the second time, what did you do?

A. I don't know sir; I disremember what I did.

Q. You don't remember anything about what you did at all now that day, do you?

A. No, sir, I don't remember.

Q. And the Saturday after that. Do you remember anything about that?

A. Well, I don't know, sir, about the Saturday after that.

Q. Nor the Saturday after that?

A. Yes, sir, the Saturday after that, I think about the first of August, I did some more watching for him, somewhere along there.

Q. You did some more?

A. Yes, sir.

Q. Then you watched about the middle of July?

A. About the middle of July.

Q. And about the first of August; three times?

A. Yes, sir.
Q. Right there together?
A. Yes sir, not one Saturday right after the other Saturday, though.
Q. One Saturday after that you didn't watch?
A. Yes, sir.
Q. And the next Saturday you didn't watch?
A. My best memory, the next Saturday, then I watched again, yes sir.
Q. That is the way you remember it now?
A. Yes, sir. That is the way I had it before.
Q. But that is the way you now remember it?
A. Yes, sir.
Q. Now let me see if I have got that right. You watched one Saturday in July; the next Saturday you watched?
A. Yes, sir.
Q. And the next Saturday you did?
A. Yes, sir.
Q. And the next Saturday you didn't watch, and the next Saturday you did?
A. Yes, sir.
Q. That is the way you remember it now?
A. Yes, sir.
Q. You are certain that is the way it happened; that is your best recollection?
A. Yes, sir.
33 Q. Of course, you don't know except from your best recollection. Then you didn't watch for him until Thanksgiving Day?
A. Until Thanksgiving Day.
Q. What did you do the Saturday before Thanksgiving Day?
A. I don't remember what I did.
Q. What did you do the Saturday after Thanksgiving Day?
A. I don't know what I did.
Q. And the next Saturday?
A. Well, the next Saturday, I could tell you what I did that Saturday.
Q. And the next Saturday?
A. Well, I don't know, sir, what I did the next Saturday.
Q. And the next?
A. The next Saturday I did some watching for him, then.
Q. Let me see if I get that now. You watched Thanksgiving Day?
A. Yes, sir.
Q. The next Saturday you didn't watch, and the next Saturday you did?
A. I watched somewhere along about the last of September.
Q. That is your recollection?
A. Yes, sir, somewhere about the last of September, somewhere like that.
Q. That is your recollection?
A. Yes, sir, about the last of September—somewhere like that.

Q. Well, now, that is your best recollection?
A. I say somewhere about the last of September.
Q. Well, I gave it right, didn't I?
A. I don't know, sir, can't count by the week.
Q. Well, did you say that?
A. No, sir.
Q. What did you say?
A. I said something like that.
Q. Well, that means you are doing the best you can to give me the best memory you have?
A. All right, sir.
Q. Isn't that correct, Jim? You and I don't want to misunderstand each other, now?
A. No, sir; we won't misunderstand each other.
Q. Well, is that correct?
A. I say some time about the last of September I did the last watching.
Q. That was after thanksgiving?
A. Yes, after Thanksgiving.
Q. In September after Thanksgiving is your recollection?
A. Yes, sir, after Thanksgiving Day.
Q. About the last of September?
A. After Thanksgiving Day, yes, sir.
Q. About the last of September?
A. After Thanksgiving Day, yes, sir.
Q. Now, Jim, you don't remember any of these dates?
A. No, sir, I don't remember any of these dates, I can't tell about them.
Q. Let us see how much money you drew that Saturday that you watched for him; how much money did you draw that day?
A. I don't know, sir.
Q. What time did you draw it?
A. I don't know, sir, what time I drew it.
Q. Did you draw it at all, or did somebody draw it for you?
A. Well, I don't know, sir, whether somebody drew it for me or I drew it.
34 Q. You don't remember about that?
A. No, sir.
Q. You have no memory at all about that?
A. No, sir.
Q. What time did you get home the first morning you watched for him?
A. I couldn't tell you to save my life.
Q. Nor what time you went home, you couldn't tell me?
A. No, sir, I couldn't tell you.
Q. You couldn't tell me anything at all about that?
A. No, sir.
Q. The second time you watched for him. Can you remember the time you got back to the factory?
A. No, sir, I couldn't tell you what time I got to the factory.
Q. Or what time you left to go home?
A. Well, I don't know, sir, what time I left to go home.

Q. You can't remember?
A. No, sir, I don't know what time I left to go home.
Q. Now the second Saturday did you draw your money—the second time you watched for him—did you draw your money on that day or not?
A. I disremember now.
Q. Did you draw it, or did somebody draw it for you?
A. I disremember.
Q. How much did you draw?
A. I don't know sir.
Q. Now, that third time, on the day before Thanksgiving; that is, three times before Thanksgiving, according to your recollection?
A. Yes, sir.
Q. Now, did you draw your money that week?
A. Before Thanksgiving I couldn't tell you about that.
Q. You don't know whether you drew your pay or whether somebody drew it for you.
A. No, sir.
Q. Or how much you drew?
A. No, sir.
Q. You don't remember that, do you?
A. No, sir.
Q. When did you draw your pay, before or after Thanksgiving, that week of Thanksgiving?
A. The week of Thanksgiving when did I draw my pay?
Q. Before or after Thanksgiving Day?
A. Well, to tell you the truth, I disremember.
Q. You don't remember?
A. No, sir.
Q. You can't remember whether you drew your pay before or after Thanksgiving?
A. No, sir.
Q. Can you remember what day of the week Thanksgiving was?
A. No, sir, I don't remember.
Q. And you don't remember what time you got down in the morning or what time you left?
A. No, sir.
Q. You have no memory at all about that, have you?
A. No, sir.
35 Q. The day after Thanksgiving. Do you remember what you had been doing that day?
A. No, sir, but to my remembrance I think I came back to work the day after Thanksgiving.
Q. Are you certain about that, or have you any memory at all about it?
A. I think I came back to work.
Q. What time did you get there?
A. I don't know, sir, what time I got there.
Q. What time did you leave that day?
A. I don't know, sir.
Q. You can't remember anything about that?
A. No, sir.

Q. The day before Thanksgiving, what time did you go down to the factory that day?
A. I don't know sir, what time I got to the factory that day.
Q. How many hours did you make that day?
A. I don't know, sir.
Q. When did you leave that day?
A. I don't know, sir.
Q. Who did you see at the factory that day, that you remember?
A. Well, I saw, I reckon, most everybody there.
Q. Well, who do you remember seeing there?
A. I remember seeing Mr. Frank.
Q. You do remember seeing Mr. Frank?
A. Yes, sir.
Q. The day before Thanksgiving?
A. Yes, sir.
Q. Did you see him the day after Thanksgiving?
A. Yes, sir, I saw him the day after Thanksgiving.
Q. You remember those two facts well?
A. Yes, sir, I remember those two.
Q. You saw Mr. Frank the day before Thanksgiving when you got there?
A. Yes, sir.
Q. And you saw him the day after Thanksgiving?
A. Yes, sir.
Q. Who else did you see?
A. Well, I don't remember now, who else I did see.
Q. You don't remember who else you saw?
A. No, sir.
Q. Did you see Mr. Darley?
A. I don't think I saw Mr. Darley.
Q. Who is the foreman in the place where you work?
A. Well, they have got foreladies there.
Q. Who is the forelady?
A. One was Miss Clark and Miss Willis.
Q. In the place where you work, where is that?
A. On the fourth floor.
Q. Did you see either one of them there that day?
A. I don't remember.
Q. Let us take the first Saturday you said you watched for him. How many hours did you make that day?
A. I don't know, sir, how many hours.
Q. You can't remember anything about that?
A. No, sir.
36 Q. Or the second day, do you know how many hours?
A. No, sir.
Q. Nor the third?
A. No, sir.
Q. Or Thanksgiving?
A. No, sir.
Q. Do you know how much you were paid for either one of those days?

A. Yes, sir, I can tell you what I was paid Thanksgiving Day when I watched for him.

Q. Well, you know that was $1.50?

A. No, sir, I said it was $1.25.

Q. Well, outside of the factory, do you remember what you got for your services?

A. Outside of the factory, I remember once I got a half a dollar; then, again, I remember getting half a dollar.

Q. That is when you were watching for him, you say?

A. Yes, sir.

Q. And you got how much on Thanksgiving Day?

A. I got $1.25.

Q. The day before that?

A. The day just before that, I don't remember just how much I got from him that day.

Q. The Saturday before that?

A. You mean for watching?

Q. Yes.

A. Well, the Saturday before that I don't know, sir, what I got that Saturday. I don't think I done any watching that Saturday.

Q. Well, you watched three Saturdays before Thanksgiving?

A. Yes, sir.

Q. And then you watched again about the last of September?

A. Yes, sir.

Q. How much did you get the first time?

A. The first——

Q. But let us take them up the other way. How much did you get the first Saturday before Thanksgiving? How much did he pay you then?

A. I remember getting 75 cents then; 50 cents from him and a quarter from the other man.

Q. Well, the next time?

A. The next time I remember getting 50 cents.

Q. The next time?

A. I remember getting 50 cents then.

Q. But you don't know how much you got for your regular work for any of those days?

A. No, sir.

Q. You can't remember anything about that?

A. No, sir——

Q. The first day you said you watched for Mr. Frank, was Snowball there that day?

A. No, sir, Snowball was not there.

Q. You didn't see him?

A. No, sir, I didn't see him. I think he laid off.

Q. How about the next day?

A. I don't remember about the next day. I don't remember whether I seen Snowball there on the next day or not. I don't remember about where he was.

37 Q. Well, the third one; was Snowball there that day?

A. I disremember about the third Saturday.

Q. Well the next one was Thanksgiving. Did you see him Thanksgiving morning?
A. I didn't see him Thanksgiving morning, but I saw him the day before Thanksgiving.
Q. That is the time when you heard Mr. Frank talking in the presence of Snowball?
A. Yes, sir.
Q. He didn't hesitate to talk for Snowball?
A. No, sir.
Q. He talked before Snowball just like he did before you?
A. Yes, sir.
Q. The first time he did that was Thanksgiving Day, that he talked before Snowball?
A. Not Thanksgiving Day, no, sir.
Q. The day before Thanksgiving?
A. Yes, sir, the day before.
Q. When was that when you and him and Snowball were talking together?
A. I don't know what time it was.
Q. You don't know what time that was?
A. No, sir, I don't know what time it was.
Q. You don't know what time that was?
A. No, sir; I don't know what time it was.
Q. Was it in the morning?
A. Yes, sir, somewhere along in the morning.
Q. Or in the afternoon?
A. It was somewhere in the morning.
Q. About what time in the morning?
A. I don't know, sir, what time it was; I reckon somewhere before 12 o'clock.
Q. Was Snowball the elevator man?
A. Yes, he was running the elevator that day.
Q. The date you don't remember, but it was sometime in September, before Thanksgiving Day?
A. Yes, sir.
Q. The day before Thanksgiving?
A. Yes, sir.
Q. And Snowball was the elevator man at that time?
A. No, sir.
Q. How came him to be running the elevator?
A. Because he wanted me to swap places with him, and I wouldn't do it; and he went to work and swept some trash in the box, and I had to sweep it out.
Q. You were the elevator man?
A. Yes, sir.
Q. But he was running it?
A. Yes, sir, he was running it then.
Q. Did Mr. Frank say anything about Snowball running it instead of you?
A. No, sir, he didn't say a word.
Q. It didn't attract his attention at all?

A. No, sir, didn't attract his attention at all.
38 Q. How long had Snowball worked at the factory?
A. I don't know, sir——

Q. Now, that time when you watched in January, was Snowball there that day—I believe you said it was in January?
A. Yes, sir, I said I watched one time in January.
Q. Well, was Snowball there?
A. I don't know whether he was or not?
Q. Now, the only time you ever heard Mr. Frank say anything in front of Snowball was that time you have just mentioned? Thanksgiving, is that what you said?
A. Yes, sir.
Q. You heard him say something before Snowball then?
A. One time was in January.
Q. Where was that, in January?
A. He said that in the box room. In the box room, he told me.
Q. Snowball was in there?
A. Yes, sir, he was helping me to stand the boxes.
Q. Snowball was in there?
A. Yes, sir, he was helping me to stand the boxes.
Q. He walked up there and told you before Snowball?
A. I don't know whether he knew Snowball was there or not.
Q. Was he close to Mr. Frank?
A. No, sir, Snowball was sitting up in the rack.
Q. Was he in sight, or not?
A. Yes, sir, he was in front of the little partition, between me and Mr. Frank.
Q. You could see him, could you?
A. No, sir, I couldn't see him from where he was standing, but I knowed he was there.
Q. Mr. Frank wouldn't hide it from Snowball; he would talk before Snowball all right?
A. I don't guess he would if he had seen him.
Q. Tell a single one he has ever talked to you about, except business, before that first time you watched for him. Give us the day and time he ever talked to you, and what he talked about?
A. I couldn't give you the day or time about that at all.
Q. Give the day when he ever jollied with you, prior to the time he talked to you the day before he talked to you the day before you watched for him?
A. I couldn't give you the date. I couldn't tell you the date about it at all——
Q. How long was that before the day you watched for him?
A. I don't know, just directly after Mr. Darley had come there.
Q. That was after he had that talk with you that you are talking about?
A. After he had what talk with me?
Q. The one that he had with you in the elevator?
A. Yes, sir, that was after that time.
Q. The first time you ever saw him have any talk at all with

Snowball, except on business, was that day he talked about that girl right before you and Snowball?
A. Yes, sir, that was the first day.
Q. That is the first time?
A. Yes, sir, the first time I saw him talk in front of Snowball.
39 Q. He just come in there and commenced talking to you, and paid no attention to Snowball?
A. He didn't know Snowball was in there.
Q. In the elevator. How could he help seeing him if he was in the elevator?
A. The elevator was gone down. Whenever I would get ready to work at night, he would send the elevator to the basement, and we would go in the back room.
Q. You were not on the elevator when you had that talk?
A. No, sir, that talk was in the back room.
Q. I am talking about just before Thanksgiving. You were in the elevator that day?
A. Yes, sir, we were in the elevator then. I was standing right there beside the elevator.
Q. Well, Snowball was standing right there by you?
A. Snowball was standing right there by me, yes, sir.
Q. He could have seen him, Mr. Frank, couldn't he?
A. Yes, sir, he was where he could have seen him, and he was where he could have heard anything that was said.
Q. And Mr. Frank knew that he could have heard anything that was said?
A. Yes, sir, he knew he could have heard anything that was said.
Q. He saw Snowball standing there?
A. Yes, sir, he saw Snowball standing there.
Q. Well, take last Thanksgiving Day. How many was there?
A. This gone Thanksgiving?
Q. Yes.
A. I don't know; there was a big crowd.
Q. When did Miss Daisy Hopkins work there?
A. Oh, she worked in 1912.
Q. 1912?
A. Yes, sir.
Q. You are certain of that?
A. Yes, sir, I am certain she worked there in 1912.
Q. What floor did she work on?
A. She worked on the fourth floor.
Q. The fourth floor?
A. Yes, sir.
Q. And she worked there in 1912?
A. Yes, sir.
Q. What time in 1912 did she quit there?
A. I don't know what time?
Q. About when, Jim?
A. I don't know when she quit there.
Q. What time of the year did you see her working there?
A. I saw her working there in 1912.

Q. What part of the year?
A. Well, I saw her working there from June on up.
Q. June on up?
A. Yes, sir, up until about near Christmas.
Q. All right, you saw her working there from June or July of 1912 until Christmas?
A. Yes, sir.
Q. Or about that time?
A. Yes, sir.
Q. And she worked on the fourth floor?
A. Yes, sir, she worked on the fourth floor.
Q. Has she worked there in 1913?
A. I don't know; I don't remember seeing her there; I don't know whether she has worked there in 1913 or not.
Q. You can't remember that?
A. No, sir, I can't remember that.
Q. You worked on the same floor with her, didn't you?
A. I didn't work with her at all. I worked on the same floor.
Q. And you don't know whether she worked there in 1913 or not?
A. No, sir, I don't remember.
Q. But you know she worked there from June until about Christmas?
A. Yes, sir, I know she worked there from June until about Christmas.
Q. You are very certain of that?
A. Yes, sir.
Q. Do you know when Miss Daisy left—Miss Daisy Hopkins?
A. No, sir.
Q. You don't remember when she left?
A. No, sir, I don't remember that.
Q. Was she married or a single lady?
A. I don't know.
Q. Now, describe Miss Daisy to us?
A. Well, Miss Daisy she was low lady, kind of heavy, and she was pretty; low, chunky, kind of heavy weight, and she was pretty.
Q. Can't you give a better description of her than that?
A. No, sir, that is the best I can give of her.
Q. What sort of color hair did she have?
A. Well, I don't remember what color hair she had.
Q. What color eyes?
A. I didn't pay no attention to her eyes.
Q. What sort of complexion?
A. What do you mean by complexion?
Q. Well, don't you know what complexion means?
A. No, sir, not complexion.
Q. You don't?
A. No, sir.
Q. You are dark complexion and I am white?
A. Yes, sir.
Q. Well, with that definition?
A. She was white complexion.

Q. Well I know, but was she fair or brunette, or was she blonde, or what was she?
A. I don't know nothing about no brunette.
Q. Was she dark skinned, or fair skinned, for a woman. I know, of course, she was a white woman; but there are some dark skins and some light skins, aren't there?
A. Yes, sir, there is some dark skins and some light skins.
Q. Which was she?
A. She was light skinned.
Q. She was light skinned?
A. Yes, sir.
Q. But you don't remember what sort of hair; what sort of nose did she have?
A. I didn't pay any attention to her nose.
41 Q. What sort of ears did she have?
A. She had ears like people.
Q. Like folks?
A. Yes, sir.
Q. I didn't expect her to have them like a rabbit; and she didn't have, did she?
A. No, sir, she didn't have ears like a rabbit.
Q. Well, did she have large or small ears? Do you remember that?
A. No, sir, I didn't pay any attention to her ears, whether they were large or small.
Q. You can't give any description of her at all now, can you, Jim?
A. I can't give a description of her, except she was a white lady.
Q. You say she was a white lady?
A. Yes, sir, and she was low and chunky.
Q. How old was she?
A. I don't know how old she was.
Q. How old did she look to be?
A. She looked to be like about 23 years old.
Q. About 23 years old?
A. Yes, sir.
Q. Was she working there when you went there or not?
A. I don't know.
Q. You don't know?
A. No, sir.
Q. The only time you can remember was that she worked from June, 1912, until Christmas, 1912?
A. Yes, sir, that is it.
Q. You can remember that?
A. Yes, sir, or near about Christmas.
Q. You can remember that?
A. Yes, sir, or near about Christmas.
Q. Now, the very first time you ever saw Miss Daisy Hopkins was some time in June, 1912?
A. Yes, sir.
Q. The first day you ever knew she was there was the day that note was sent down?

A. Yes, sir.

Q. The first day you ever knew she was there was the day that note was sent down?

A. Yes, sir.

Q. You don't remember ever to save seen her there before that?

A. Yes, sir, I remember seeing her there after that time.

Q. I said before?

A. No, sir, I don't remember seeing her there before that time.

Q. That is the way you fix it now, how do you fix the time she left there?

A. How do I fix the time she left there during Christmas?

Q. That is what I want to know?

A. Because Mr. Dalton told me she wasn't coming back.

Q. Mr. Dalton told you?

A. Yes, sir.

Q. Did Mr. Dalton work there?

A. No, sir, he didn't work there.

Q. Where does Mr. Dalton work?

42 A. I don't know where Mr. Dalton works at.

Q. When Mr. Dalton told you Christmas that she was going away, where was Mr. Dalton?

A. He was there.

Q. I know, but where was he when he told you that?

A. He was coming out of the factory.

Q. When was that?

A. It was Saturday; I don't know the date.

Q. You don't remember the date?

A. No, sir.

Q. You don't remember the date now?

A. No, sir.

Q. You don't remember his name?

A. I know his name was Dalton.

Q. What else besides Dalton?

A. No, sir, I don't know his first name.

Q. You don't know where he lived?

A. No, sir.

Q. Or where he works?

A. No, sir.

Q. Describe Mr. Dalton to me?

A. Do what?

Q. Tell me what kind of a looking man Mr. Dalton was?

A. He was a slim looking man, and tall with it.

Q. A slim looking man, and tall with it?

A. Yes, sir.

Q. And what else?

A. That is all I can tell you about him.

Q. You can't give any other or better description?

A. No, sir; his eye lashes seemed to be a little thick.

Q. Eye lashes thick?

A. Yes, sir.

Q. What was the color of his eye lashes?

A. I disremember now what color his eye lashes was.

Q. What was the color of his hair?
A. His hair was black, I think; I am not sure.
Q. Are you certain?
A. No, sir, I am not.
Q. You are not certain about that?
A. No, sir.
Q. What sort of complexion did he have?
A. What kind of complexion?
Q. Was he light complexion, or dark complexion? Was he darker or lighter complexion than I am?
A. He was just about your complexion.
Q. About my complexion?
A. Yes, sir.
Q. Well, would you call me a light complected man or a dark complected man?
A. I could call you a light complected man.
Q. Light?
A. Yes, sir.
Q. How much did Mr. Dalton weigh—about how much?
A. I don't know; about 135 pounds.
43 Q. About how tall was he—would you say he was?
A. Well, he was tall; I guess he was about as tall as that young man sitting there.
Q. About as tall as this man (indicating Mr. Arnold)?
A. Yes, sir.
Q. Weighing about as much?
A. I don t know whether he would weigh as much as that man, or not.
Q. Does he look like he would weigh about that much?
A. Yes, sir, he looks like he would weigh about that much.
Q. Then he was about the size of Mr. Arnold, Mr. Dalton was?
A. Yes, sir, just about that size.
Q. How old a man did Mr. Dalton look to be?
A. He looked to be a man somewhere about 35 years old.
Q. About 35 years old?
A. Yes, sir.
Q. You don't know where he lived?
A. No, sir.
Q. You don't know anything about that?
A. No, sir, I don't know where he lived at.
Q. How many times did you ever see him?
A. I don't know about that.
Q. Did you see him around the factory?
A. I saw him around there, coming around the factory after a girl.
Q. Did you ever see him any other place except around the factory?
A. No, sir, I never saw him anywhere except around the factory.
Q. How many times did you see him around the factory?
A. Several times I saw him there.
Q. About how many?

89

A. I don't know.

Q. You saw him one time coming out with a girl; what was he doing the other times you saw him?

A. The first time I saw him he was going out with a lady that he brought in there.

Q. That is the time you have done told about?

A. Yes, sir.

Q. What date was that, about when?

A. That was on Saturday.

Q. Well, about what month?

A. Somewhere along in June.

Q. Somewhere along in June or July?

A. July.

Q. Sometime in July?

A. Yes, sir.

Q. That is the first time you ever saw him?

A. Some time about the last of July.

Q. Where did you see him then?

A. Around at the factory.

Q. What was he doing then?

A. He come there with a lady.

Q. That same one?

A. Yes, sir.

Q. That same lady?

A. Yes, sir.

Q. You have done told about that this morning?

A. Yes, sir.

44 Q. When did you see him again?

A. I saw him again about two weeks after that.

Q. What was he doing then?

A. I just met him in the door then.

Q. Met him in the door?

A. Yes, sir.

Q. What date was that, about when?

A. I don't know; it was on a Saturday; I disremember the time.

Q. That is the time you have already talked about. You have done told about that?

A. Yes, sir, I have done told about it.

Q. This morning?

A. Yes, sir.

Q. What month was that?

A. I don't know; somewhere about the last of August, I reckon.

Q. About the last of August, you reckon?

A. Yes, sir.

Q. When did you see him again?

A. I didn't see him no more, I don't reckon, until along about up to that Thanksgiving time.

Q. Where did you see him then?

A. I saw him there, coming in there with a lady.

Q. That is the same Thanksgiving Day you have already told about?

A. Yes, sir.
Q. He come in there Thanksgiving?
A. No, sir, I didn't say Thanksgiving; it was before Thanksgiving. I said before Thanksgiving.
Q. When did you see him again?
A. No more then until after Christmas.
Q. Then where did you see him?
A. I saw him there to the factory with a lady.
Q. Did you ever see him anywhere else, except those times coming out of the factory?
A. No, sir, that is all.
Q. You saw him about Christmas?
A. Yes, sir, I saw him coming into the factory.
Q. You said until after Christmas?
A. I said this last time, I didn't see him no more until after Christmas.
Q. It was Christmas?
A. I didn't see him on Christmas day.
Q. About what time did you see him?
A. Sometime along in January.
Q. Somewhere along in January?
A. Yes, sir.
Q. Who did he come out with?
A. He came out that time by himself.
Q. By himself; where had he been?
A. Him and the lady was down in the basement.
Q. Down in the basement?
A. Yes, sir.
Q. Do you know who she was?
A. I don't know her name, but I know her face, and I know where she lives.
Q. How long since you have seen Mr. Dalton?
A. Well, I haven't seen Mr. Dalton now in about a month or more.
45 Q. Where did you see him the last time?
A. The detectives brought him down there to the station house, and said had I ever seen him about in there.
Q. And you told them what you knew?
A. Yes, sir, I told them about what I knew.
Q. And you haven't seen Mr. Dalton since then?
A. No, sir.
Q. Now, Jim, how was Mr. Dalton dressed the first time you ever saw him?
A. Well, I disremember now how he was dressed.
Q. Can't you give us any help about that at all?
A. All I can remember him having on, I think, was a brownish looking suit of clothes.
Q. What sort of hat did he have on?
A. I didn't pay no attention to his hat.
Q. What sort of shoes did he have on?
A. I didn't pay no attention to the shoes.

Q. When was the next time you happened to see him?
A. The next time I saw him.
Q. What sort of clothes did he have on then?
A. I disremember. I didn't pay no attention to his clothes.
Q. The next time, what did he have on?
A. I don't know what he had on the next time; I didn't pay no attention to that.
Q. And the next time?
A. I didn't pay n oattention to his clothes that time.
Q. The last time you saw him what did he have on?
A. I didn't pay no attention to his clothes that time.
Q. You can't tell me anything about what sort of clothes he ever wore, except the one time that he had on a brown suit?
A. Yes, sir, he looked like a man that had just got off from work and put on clothes enough so as to go through the streets.
Q. He had on a brownish suit?
A. Yes, sir.
Q. Did he have any mustache the first time you ever saw him?
A. No, sir, he didn't have any mustache.
Q. Did you ever see him with any mustache?
A. Not to my knowing.
Q. You know you saw him?
A. Yes, sir, I know that I saw him, but I didn't pay no attention to his mustache.
Q. Did he have any whiskers?
A. No, sir, he didn't have any whiskers.
Q. And you don't remember whether he ever had any mustache?
A. No, sir, I can't remember whether he had a mustache or not.
Q. You wouldn't want to say about that?
A. No, sir, I wouldn't want to say about that, because I don't remember about that.
Q. Now, take the first day you said you waited there for Mr. Frank. Did you see anybody, Mr. Darley, that day about the factory, or Mr. Holloway?
A. The first Saturday?
Q. Yes.
A. Yes, sir, I saw Mr. Holloway there on the first Saturday.
46 Q. What time did he leave there?
A. Well, I don't know. He left away from there somewhere about two or half past two, I reckon.
Q. Well, don't reckon, please; tell what you remember?
A. He left away from there about two or half past two, all right; I couldn't say just what time it was.
Q. You don't know what time it was?
A. He generally stayed——
Q. Not what he generally did; but on that particular day—that day, what time did he leave—the first time you said you waited for Mr. Frank?
A. He left away from there somewhere about two or half past two.
Q. Do you remember it?
A. Yes, sir, I can remember it.

Q. Did you see Mr. Darley that day?
A. I saw him that morning.
Q. Well, now, what time did he leave?
A. I don't know what time he left.
Q. Well, now, why can't you tell when he left the factory, if you know when Mr. Holloway left?
A. Because I always met Mr. Holloway when he was leaving, because he was always leaving, too.
Q. Always leaving?
A. Yes, sir.
Q. You don't know how late he stayed there that day, do you, nor whether he came back or not?
A. No, sir, I don't know whether he came back or not.
Q. The next time you watched, did you see Mr. Holloway that day?
A. The next Saturday I watched, I don't think Mr. Holloway was there; the next Saturday he was sick.
Q. You don't think you saw him?
A. No, sir, I don't think I saw him.
Q. He was sick?
A. He was sick that Saturday.
Q. He was sick on that Saturday?
A. Two Saturdays in June.
Q. He was sick one Saturday when you watched?
A. Yes, sir.
Q. About what date was it; about what date was it when you watched, when he was sick?
A. It was somwhere about three o'clock, I reckon.
Q. What month was it that old man Holloway was sick when you watched?
A. I don't know whether he was sick or not; they told me he was sick.
Q. You said he was sick?
A. They told me he was sick.
Q. They reported to you that he was sick?
A. Yes, sir.
Q. What date was that?
A. It was about the last of July, the first or last—or something like that.
Q. What date was it?
A. It was the last of July or first of August, or something like that.
Q. You said he was sick again. When was he sick again?
A. He was sick again up in this year.
47 Q. This year?
A. Yes, sir.
Q. I am not talking about that. Did you see Mr. Darley that time when Mr. Holloway was sick?
A. When Mr. Holloway was sick, I disremember now whether I seen Mr. Darley that day or not.
Q. Did you see Mr. Schiff that day?

A. I disremember whether I saw Mr. Schiff or not.
Q. You disremember that?
A. Yes, sir.
Q. Did you see anybody that day?
A. Yes, sir, I seen somebody that day.
Q. Who?
A. I saw Mr. Frank that day for one person.
Q. I know; but outside of Mr. Frank, who else of the office force did you see that day—anybody or not?
A. The office force; well, I disremember now.
Q. You disremember now?
A. Yes, sir.
Q. Well, now, the next time you watched there, that was Thanksgiving, wasn't it?
A. No, sir, that was before Thanksgiving.
Q. Before Thanksgiving?
A. Yes, sir.
Q. About what time?
A. Well, it was somewhere about the last of August.
Q. Last of August?
A. Yes, sir.
Q. Well, now did you see anybody there that day? Was Mr. Holloway sick that day, too? He was sick that day, too, wasn't he?
A. No, sir, he wasn't sick that day.
Q. Did you see him.
A. Yes, sir, I saw him that day.
Q. What time did he leave that day?
A. I don't know; he left about two o'clock, I reckon.
Q. Don't reckon, please, Jim; tell us if you have any memory about it, say so; and if you haven't, say you haven't, please.
A. He left away from there about two o'clock.
Q. Then, awhile ago you said about half past two, and now you state two?
A. No, sir, I said he left away from there about half past two the first time.
Q. And this time, what time did you say he left?
A. I said he left away from there about two.
Q. About two o'clock?
A. Yes, sir, that time.
Q. Did you see Mr. Darley that day?
A. I disremember whether I did or not.
Q. You disremember that?
A. Yes, sir.
Q. The next time was Thanksgiving day—that you watched for him?
A. The next time I watched for him——
Q. Was Thanksgiving Day?
A. Was the last day, the last of September, behind Thanksgiving Day.
48 Q. That was behind Thanksgiving Day?
A. Yes, sir.

Q. Before or after Thanksgiving, Jim?
A. This here was before Thanksgiving.
Q. Haven't you said half a dozen times that you watched in September, and that was after Thanksgiving? Haven't you told that a dozen times to the jury?
A. I said it was after Thanksgiving.
Q. Yes?
A. Well, September is after Thanksgiving.
Q. Your understanding is that it was after Th
A. Yes, sir, it was after Thanksgiving.
Q. So that it was in September, after Thanksgiving?
A. Yes, sir.
Q. That is correct, now, Jim?
A. Yes, sir, after Thanksgiving.
Q. Yes, that is right. Well now, that day, Mr. Darley was there that day?
A. Yes, sir, I remember seeing him that day.
Q. Was Mr. Schiff there?
A. Yes, sir; Mr. Schiff was there that day.
Q. What time did Mr. Darley leave?
A. I don't know what time he left.
Q. What time did Mr. Schiff leave?
A. I don't know what time he left.
Q. What time did Mr. Holloway leave?
A. Mr. Holloway left away from there about half past two.
Q. Do you remember that?
A. Yes, sir, I can remember that.
Q. How can you remember when Mr. Holloway left and yet don't remember when anybody else left?
A. I can always remember when he leaves, because you always have to tell him when you have to leave out and how long you are going to stay.
Q. You tell him when you are going to leave, and how long you are going to stay?
A. I didn't tell him that time, because I was going to work that evening.
Q. The next time, did you tell him you were going to ring out?
A. No, sir, I didn't tell him that I was going to ring out.
Q. The next time, did you tell him?
A. No, sir, I just told him I was going to work.
Q. If you never told him that you were going to ring out, how do you remember when he left?
A. Because I will tell you, if I didn't have any other work to do I would go down to the first floor and sit on a box and go to smoking, and he worked down there.
Q. And you didn't tell him when you were going to ring out?
A. No, sir. I didn't tell him when I was going to ring out.
Q. Therefore, your ringing out had nothing to do with when he left, because you never told him?
A. No, sir, I never told him that.

Q. You never told him anything about it? Well, now, in September, after Thanksgiving, was Mr. Darley there that day?
A. Yes, sir, I remember seeing Mr. Darley that day.
Q. Was Mr. Schiff there that day?
A. Yes, sir, I remember seeing him there.
49 Q. What time did Mr. Holloway leave?
A. Mr. Holloway left away from there about two o'clock.
Q. The next time you watched was right after Christmas?
A. No, sir, the next time I watched was Thanksgiving Day, then——
Q. You said awhile ago September was after Thanksgiving?
A. Yes, sir, after Thanksgiving day.
Q. All right. Well, now, Thanksgiving Day, the day you have told about in January, who did you see there in January, I mean who of the force?
A. I disremember now who I did see in January when I was there that morning.
Q. You disremember?
A. Yes, sir, I disremember.
Q. Can you remember anybody you saw there?
A. Nobody I saw there at all. Mr. Holloway, I can remember.
Q. Jim, isn't it true that on every Saturday morning, a number of people come there to that factory always?
A. Well, I don't know, I couldn't tell; nobody but just them that worked there.
Q. The first you watched, tell us anybody that come there that day?
A. I couldn't remember that; I couldn't tell you.
Q. You don't know about that?
A. No, sir.
Q. The second time, you don't know whether anybody was working there or not?
A. To my memory, I think there were some young ladies working up on the fourth floor.
Q. Some ladies working there that evening up on the fourth floor?
A. Yes, sir.
Q. That is your memory about the second time?
A. Yes, sir.
Q. Then, the third time, was anybody working there that evening, Saturday evening?
A. I don't know about the third time.
Q. You don't remember whether there were some young ladies working up there that evening?
A. No, sir, I don't know about the third time.
Q. You can't remember about that?
A. No, sir.
Q. Well now, Thanksgiving, do you know whether anybody was working there Thanksgiving evening?
A. No, sir, I don't know whether anybody was working there Thanksgiving evening or not.

Q. You dont know whether Mr. Schiff worked there that evening?
A. No, sir, I don't know whether Mr. Schiff worked that evening or not.
Q. You can't remember that, can you?
A. I didn't see Mr. Schiff at all.
Q. You can't remember whether he was there or not?
A. No, sir.
Q. You wouldn't swear that he was not there?
A. I will swear I didn't see him; I will swear he wasn't in the office with Mr. Frank.
Q. You swear to that?
A. Yes, sir.
Q. Will you swear he wasn't there that day?
A. I will swear Mr. Irby was working in the office.
50 Q. Thanksgiving Day?
A. No, sir, he wasn't working in the office on Thanksgiving.
Q. The next time, was there any ladies working on the fourth floor?
A. I don't remember.
Q. You don't remember whether there were or not?
A. No, sir.
Q. You can't remember that?
A. No, sir.
Q. There might have been?
A. I didn't see none of them there.
Q. You didn't see them?
A. No, sir.
Q. You only saw them working there one day?
A. I saw them working there the second evening.
Q. On the fourth floor. * * *
Q. Did you say anything about it? Do you think that you told about watching for Frank at that time. You think you told that at that time?
A. I don't know where I told them at that very time.
Q. Didn't you say that you did?
A. No, sir.
Q. That's your opinion that you did.
A. I ain't got no opinion about it.
Q. Well, that's your best recollection that you did?
A. No, sir, it's not my best recollection.
Q. Well, what is your best recollection, that you didn't then?
A. What do you mean by that.
Q. Did you or did you not?
A. I don't know, sir. I'm telling you the truth.
Q. Well, he had already had that signal about stamping and whistling a long time. What did he give it to you over again for?
A. He told me that Thanksgiving, but didn't do it until I set them on the box.
Q. Didn't you say he always gave you that signal?
A. No, sir. I didn't say he always gave me that signal.

Q. Gave it to you Thanksgiving?
A. Yes, sir.
Q. And repeated it to you that day again?
A. Yes, sir.

The witness Conley was examined by the solicitor, who brought out the direct questions and answers Supra, and was then cross-examined by the defendant, when counsel brought out the cross-questions and answers Supra.

Thereafter, and while the witness Conley was still on the stand, Defendant's Counsel moved to rule out, exclude, and withdraw from the jury each and all of said questions and answers, upon the grounds stated at the time said motion was made that said questions and answers were irrelevant, immaterial, prejudicial, and dealt with other matters and things irrelevant and disconnected with the issues in the case.

The Court denied this motion in writing, making in so doing the following order:

51 "When the witness Conley was still on the stand his testimony not having been finished, the defendant, by his attorneys, moved to rule out, withdraw and exclude from the jury each and all the above questions and answers, because the same are irrelevant, immaterial, prejudicial, and deals with other matters and things irrelevant and disconnected with the issues of this case. After hearing argument of counsel, the Court overruled the motion to rule out, withdraw or exclude said above stated questions and answers from the jury, but permitted the same to remain before the jury."

In making said order and declining to rule out, exclude and withdraw said questions, and each of them, as well as all of the answers and each of them, the Court erred, for the reason that said questions and answers, each and all of them, were irrelevant, immaterial, illegal, prejudicial, and dealt with other matters and things wholly disconnected with the issues on trial, and the same amounted to accusing the defendant of other and independent crimes.

Defendant contends that this ruling of the Court was highly prejudicial to the defendant, tending to disgrace him before the jury and expose him to a conviction, not because he had committed murder, but because he was accused of depravity and degeneracy.

When the third of the direct questions here sought to be excluded was asked by the solicitor the defendant objected because the evidence sought would be immaterial. The Court sustained the objection but the solicitor continued with the balance of the direct questions and answers here objected to and the cross-questions were thereafter asked and the answers given. The Court therefore erred in not excluding and withdrawing all of said testimony.

14. Because the Court erred in not ruling out, excluding, and withdrawing the following evidence direct and cross of the witness Conley, upon motion of defendant's counsel, made while Conley was still on the stand.

"I always stayed on the first floor like I stayed April 26th and watched for Mr. Frank while he and a young lady would be up on

the second floor chatting. I don't know what they were doing; he only told me they wanted to chat. When the young ladies would come there, I would sit down at the first floor and watch the door for him. I watched for him several times. There will be one lady for Mr. Frank and one lady for another young man who was there. Mr. Frank was there along on Thanksgiving Day. I watched for him several times. A tall, heavy built lady come there that day. He told me when the lady came he would stamp and let me know that was the lady, and for me to go and lock the door. Well, the lady came, and he stamped, and I locked the door. He told me when he got through with the lady he would whistle for me to go and unlock the door. * * * And he says: (on April 26th) 'Now, when the lady comes, I will stamp like I did before * * * I have seen Mr. Frank there in the office two or three times before Thanksgiving, and a lady was in the office, and she was sitting down in a chair and she had her clothes up to here, and he was down on his knees, and she had her hands on him. I have also seen Mr. Frank another time with a young lady lying on the table. She was on the edge of the table. I don't know the name of the woman that was there Thanksgiving Day; the man that was there was Mr. Dalton. * * * The lady that was there was a tall built
52 lady, heavy weight, she was nice looking, had on a blue looking dress with white dots in it, had on a greyish looking coat with kind of tails on it, white slippers and white stockings.

Cross-examination:

"The first time I watched for Mr. Frank was sometime during last summer, about in July. I would be there sweeping and Mr. Frank come out and called me in the office. That was on a Saturday, about three o'clock. As to what Mr. Dalton would do, the young lady that worked at the factory would go out and get him and bring him back there. That was Mr. Dalton's lady. The lady that was with Mr. Frank was Miss Daisy Hopkins. She worked up there on the fourth floor. When Mr. Frank called me, there was a lady in the office with him. He talked to me in the lady's presence. She was Miss Daisy Hopkins. That was three or half past three. He would say: 'Did you see that lady go out there? You go down and see nobody don't come up here and you will have a chance to make some money.' One lady had already gone on out to get that young man, and the other lady was present. She came back after a while and brought Mr. Dalton with her. They walked into Mr. Frank's office and stayed there ten or fifteen minutes, came back down, and she says: 'All right, James,' and I says: 'All right:' and I would go back there to the trap door that leads down to the basement, and I pulled up the trap door, and they went down there. I opened the door because she said she was ready; I knowed where she was going. Mr. Frank told me to watch; he told me where they were going. I don't know how long they stayed there; I don't know what time they came back, but they came back after a while, the same way they came down. I kept the doors shut—not locked—all the time, and

never left it. Mr. Dalton gave me a quarter and went out laughing, and the lady went up the steps. She didn't stay very long and came down, and after that Mr. Frank came down and left. That was about half past four. I left before Mr. Frank did. He gave me a quarter. That was the first Saturday. The next Saturday was about two weeks after that, about the last of July or the first of August. He told me the same Saturday that I was there: 'Now, you know what you done for me last Saturday. I want to put you wise this Saturday.' I says: 'All right, what time?' He says: 'Oh, about half past.' He got back from lunch about a quarter past two, then Mr. Holloway left, and then Miss Daisy Hopkins came into his office. Mr. Frank came out, popped his fingers and bowed to me—bowed his head to me, and then went back in the office. Then, I went down and stood by the door. I didn't lock it; I shut it. I don't know what happened next; I didn't hear him come out of his office at all. Then I went down and watched. No, I didn't hear her come out of his office. Mr. Frank stayed there about a half an hour that day, then the girl went out. He gave me a half a dollar, this time. The next time I watched for him was before Thanksgiving Day, sometime in the winter, about the last part of August. When he told me he wanted me to watch for him that time, it was on the fourth floor, right at the elevator. Snowball was standing there then. Mr. Frank says: 'I want to put you wise again for to-day.' He came back about half past two, and he says: 'She will be here in a minute.' The lady that came in was one that worked on the fourth floor. I don't know her name. It wasn't Miss Daisy Hopkins. She had hair like Mr. Hooper's, grey haired. She had a green suit of clothes. She went to Mr. Frank's office, and then I watched. I didn't hear them leave Mr. Frank's office. Then she came out, and then he came out and went out the factory, and then he came back. I stayed there waiting for him. He said: 'I didn't take out that money.' I says: 'I seed you didn't.' He
53 said: 'That's all right, old boy. I don't want you to have anything to say to Mr. Herbert or Mr. Darley about what's going on around here.' The next time I watched was Thanksgiving day. I met Mr. Frank there about eight o'clock in the morning. He says: 'A lady will be here in a little while; me and her are going to chat. I don't want you to do no work; I just want you to watch.' The lady came in about a half an hour. I didn't know her; I have never seen her working at the factory. I had seen her at the factory two or three nights before Thanksgiving Day in Mr. Frank's office about eight o'clock. She was a nice looking lady. I think she had on black clothes. She was a very tall, heavy built lady. The front door was open when she came Thanksgiving Day. She went up stairs and went in Mr. Frank's office. Mr. Frank came out and stamped right above the trash barrel. I was down stairs about the trash barrel. He told me he was going to stamp two times; then he stamped, and I closed the door, and then I came back and sat on the box about an hour and a half. Mr. Frank says: 'I'll stamp after this lady comes, and you go and shut the door and turn that night latch.' That's the first time he told me to lock the door, and he says: 'If everything is all right, you take and kick against the door.' And I kicked against

the door. I stayed there about an hour and a half that time. Then Mr. Frank came down and unlocked the front door, looked up the street, and then went back and told the lady to come down. She came down and said to Mr. Frank, while they were walking: 'Is that the nigger?' and he says: 'Yes.' And she says: 'Well, does he talk much?' and he says: 'He's the best nigger I've ever seen.' They went on out together; Mr. Frank came back. I went in his office. He gave me a $1.25. The lady had on a blue skirt with white dots in it, and white slippers and white stockings, and a grey tailor-made coat with pieces of black velvet on the edges of it, and a black hat with big black feathers over. The next time I watched for him was a Saturday in January, right after the first of the year. He said there will be a young man and two ladies that would be there that Saturday morning. I was standing by the side of Gordon Bailey on the elevator when he come and told me that about half past seven in the morning, and he said I could make some money off this man. Gordon Bailey and me was on the elevator together. He could hear what Mr. Frank was saying. I got through cleaning at about a quarter after two and stayed at the door. It was open, and the ladies came about half past two or three o'clock, and the young man came in and says: 'Mr. Frank put you wise?' 'Didn't he tell you to watch the door, two ladies and a young man would be there?' He said: 'Well, I'm the one.' Then he come and told the ladies to come on, and they went up stairs towards the clock; they stayed there about two hours. I didn't know either of the ladies. I don't know what they had on. The man was tall, slim built, heavy man; he didn't work there. I seen him talking to Mr. Holloway frequently during the week. That's the last time I watched for him. Snowball and I were in the box room when he told me to watch for him that time. I don't know if he knew Snowball was there or not. The day before Thanksgiving, when he talked to Snowball, we were on the elevator. Snowball could have heard anything that was said; Mr. Frank saw Snowball standing there. * * * Miss Daisy Hopkins worked at the factory from June, 1912, until Christmas. I worked on the same floor with her. I am sure she worked there from June until about Christmas. She was a low lady, kind of heavy; she was pretty, chunky, kind of heavy weight. I remember that she was there in June because I took a note to Mr. Herbert Schiff which she gave me. Mr. Schiff said it had June on it, when he read it. It was on the outside of the note. I looked and seen something on it; I don't know what it was. It was on the back of the note—June
54 something, and he laughed at it. I know Miss Daisy Hopkins left at Christmas, because Mr. Dalton told me that she wasn't coming back. It was one Saturday. Mr. Dalton was a slim looking man and tall, with thick eye lashes, black hair, light complected, weighed about 135 pounds, about thirty-five years old. I seen him around the factory several times. The first time was somewhere along in July, when he come in there with a lady. About two weeks after that, I met him at the door, about the last of August. The next time was just about Thanksgiving Day. Then I saw him after Christmas

when he come there with a lady. Him and the lady was down in the basement. I don't know who she was. Last time I saw him was down at the station house. The detectives brought him down there. First Saturday I watched for Mr. Frank, I saw Mr. Holloway there; he left about half past two. I saw Mr. Darley that morning; don't know what time he left. The next Saturday I watched Mr. Holloway wasn't there; he was sick. That was about the last of July or first of August. The next time I watched, about the last of August, I saw Mr. Holloway. He left about two o'clock. The day I watched for him in September, after Thanksgiving Day, I saw Mr. Holloway leave about half past two. Schiff and Darley were there. I disremember who I saw there in January, except Mr. Holloway. Sometimes some of the girls worked there on Saturdays. Don't remember any girls that worked there on the first Saturday that I watched. The second time I watched, I think some ladies were working up on the fourth floor. I don't know about the third time, and I don't know whether anybody was working there Thanksgiving afternoon or not. I didn't see Mr. Schiff at all that day. I will swear he wasn't in Mr. Frank's office that day. I don't remember whether any ladies worked there the other times I was watching, or not. * * * I don't know whether I told them (detectives) about watching for Frank at that time. I haven't got any opinion about it. I haven't got any recollection. He told me about stamping and whistling on Thanksgiving Day, but didn't do it until I set them on the box."

Conley had testified both on direct and had been cross examined for a day and a half on other subjects, as above set out, and while on the stand and after testifying as above set out, counsel for defendant moved to rule out, exclude and withdraw each and every part of the evidence given by the witness as to all transactions had between Frank and other women at other times than on the day of the alleged murder, upon the grounds, made at the time, that evidence of such transactions was irrelevant, immaterial, illegal, prejudicial, and dealt with other matters and things irrelevant to and disconnected with the issues on trial, and the same amounted to accusing the defendant of other and independent crimes.

The evidence next above set out was, and is, all the evidence given by Conley dealing with Frank's transactions with women at other times than on the day of the murder, and was the evidence sought to be ruled out, excluded, and withdrawn from the consideration of the jury.

The Court declined, upon the motion made and for the reasons argued, to rule out, exclude and withdraw such evidence from the jury but left the jury free to consider the same.

The ruling of the Court was, and is, erroneous, for the reasons alleged above, and the Court erred in not granting the order asked, ruling out, excluding, and withdrawing such evidence from the jury.

55 When the solicitor first sought from the witness Conley the evidence here sought to be excluded the defendant objected because the evidence sought to be brought out would be im-

material. The Court ruled that such evidence would be immaterial, but after this ruling the solicitor brought out the direct testimony here sought to be ruled out and excluded. After the direct testimony supra had been brought out after the Court's ruling, the cross testimony supra here sought to be withdrawn was also brought out in an effort to modify or explain the direct evidence. Under the circumstances the Court ought to have granted the motion to exclude and withdraw all such evidence and for failing to do so committed error.

Movant assigns as error the action of the Court in allowing this evidence to go before the jury because the same is illegal, irrelevant, immaterial and hurtful to the defendant.

15. Because the Court permitted, over the objection of defendant's counsel made when the evidence was offered, that such evidence was irrelevant and immaterial, the witness Conley to swear that the police officers took him down to the jail, and to the door where Frank was, but that he never saw Frank at jail and had no conversation with him there.

The Court erred in permitting the introduction of this evidence, for the reasons above stated. It was hurtful for the reason that the solicitor contended, in his address to the jury, that Frank declined to see Conley, and that such declination was evidence of his guilt.

16. Because the Court, over objection of the defendant, made at the time the evidence was offered, that the same was irrelevant, immaterial, and not binding on Frank, permitted the witness, Mrs. White, to testify that Arthur White, her husband, and Campbell are both connected with the Pencil Company, and that she never reported seeing the negro on April 26th, 1913, which she testified she did see, in the pencil factory, to the City detectives until May the 7th, 1913.

For the reasons above stated, the Court erred in not excluding the evidence, and for the reason that the solicitor, in his address to the jury, contended that the fact that there was a negro (which he contended was Conley) in the factory the morning of April 26th was concealed from the authorities, and that such concealment was evidence of Frank's guilt.

17. Because the Court permitted, over the objection of defendant's counsel made when the same was offered, that the same was irrelevant and immaterial, the witness Mangum, to testify that Conley and another party went down from the pencil factory to the jail, that he had a conversation with Mr. Frank about confronting Conley, Frank then being on the fourth floor of the jail; that Chief Beavers, Chief Lanford, and Mr. Scott, with Conley, came to the jail to see Frank, and they asked him if they could see him; that he said: "I will go and see; and, if he is willing, it is all
56 right;" that he went to Frank and said: "Mr. Frank, Chief Beavers, Chief Lanford and Scott and Conley want to talk with you, if you want to see them;" that Frank said: "No, my attorney is not here, and I have got nobody to defend me;" that his lawyer was not there, and that no one was there to listen to what might be said.

The Court erred in admitting this evidence for the reasons above stated.

The solicitor in his argument pressed on the jury that the failure of Frank to face this negro and the detectives was evidence of guilt, and movant contends same was prejudicial.

18. Because the Court erred in permitting the witness, Dr. H. F. Harris, over the objection of the defendant, made at the time the testimony was offered that the same was irrelevant and immaterial, to testify:

"I might preface my remarks on this by saying that more than 12 or 15 years ago someone told me that the reason that cabbage was considered indigestible was because they were ordinarily cooked with meat or grease, and with the idea of settling this question, on my clinic I got a lot of patients whose stomachs were not in very good condition, and made a number of experiments particularly to determine the matter as to whether or not this was the case. During the course of the experiment that I made at that time, I was struck by the fact that the behaviour of the stomach after taking a small meal of cabbage and bread, either cornbread or biscuit—that the behaviour of the stomach was practically the same as after taking some biscuit and some water alone.

"I discovered, as I say, at that time, that our ideas about how quickly cabbage digested were rather erroneous, and as I remarked a moment ago, I observed that the stomach freed itself of a mixture of cabbage and bread just about as quickly as we only gave bread alone; the amount of recovery on the part of the mucuous membrane in the way of sufficient gastric juices was about the same practically or probably a little bit more recovery with cabbage.

"It is the only way I can get at it, it is the only real knowledge I have on the subject in connection with the work that was done in this particular instance here."

The witness Harris testified that from the state of digestion of the food found in the stomach of Mary Phagan he could say she died in 30 or 40 minutes after her last meal of bread and cabbage, over the objection above made and the further objection that the witness could not give the result of other and different experiments made 12 or 15 years ago upon persons "whose stomachs were not in a very good condition," and not under the same circumstances and conditions, to sustain and bolster up the experiment made upon the stomach of Mary Phagan, and to sustain his assertion that Mary Phagan died from 30 to 40 minutes after she ate her last meal.

The Court overruled the objection and admitted the testimony and in doing so, the court for the reasons indicated, committed prejudicial error.

19. Because the court erred in permitting the witness, Dr. H. F. Harris, to testify, over the objection of the defendant made when the evidence was submitted, that the same was irrelevant
57 and immaterial and that experts could not give to sustain their opinions individual and isolated experiments but must answer from their knowledge of the science obtained from all sources, that * * *

"Knowing the facts that cabbage would pass out of the stomach very quickly in a normal one, I ascertained her digestion, and as soon as I saw the cabbage in this case, I at once felt certain that this girl either came to her death or possibly the blow on her head at any rate, a very short time, perhaps three quarters of an hour or half an hour or forty minutes, or something like that, before death occurred. I then began a number of experiments with some gentlemen who had normal stomachs with a view of judging of the time.

"I had the mother of the girl to cook some cabbage, and it was given to people with absolutely normal stomachs; that I know from investigations of their stomachs.

"I will state in general terms there were only four persons experimented upon, and two of them were experimented upon twice in this connection, and in every single instance the effect on the cabbage was practically the same, that is, it was almost entirely digested, notwithstanding the fact that I had those men given some pieces just as large as were found in Mary Phagan's stomach, and I took pains to see to it that they did not chew this cabbage, but they ate it very rapidly, in three or four minutes, gulped it down, so that we would have as nearly as possible the conditions that I was certain existed at the time Mary Phagan ate her last meal. The result of this, you gentlemen have seen."

(The witness here was permitted over the objection as above stated, to exhibit several small glass jars containing what purported to be partly digested cabbage, resulting from experiments made.)

"Now I know from my observations of the cases that I present here that the digestion of these persons was normal. I did not make a microscopic examination of the stomachs of the gentlemen experimented upon, but I made an examination of their stomachs to see how they secrete their food, which is the only way we can tell. You can take the fluids and tell whether the stomach is normal, it is the only way we possess.

"I merely wish to call attention to the fact that I made experiments which varied in the time that the contents were in the person's stomach, from 38 minutes, which was the time the contents were in the stomach of the boy 14 years of age, to 70 minutes, in another one of my cases, and the results indicated in every instance, from 38 to 70 minutes, in every single instance, the cabbage was practically digested, practically altogether so."

Over objections made as is above stated, the Court permitted this testimony to go to the jury and in doing so committed prejudicial error. Experts can testify from the given state of any science, but can not explain the process or results of particular experiments made by themselves.

20. Because the Court permitted the witness Harris to testify as follows:

"I wish to say that I made a microscopic examination of those contents of the stomachs, and while I found in Mary Phagan's case, except in the case of particles of cabbage that were chewed up too small to give sufficient indication, the cabbage that was in the

58 stomach gives every indication of having been introduced into it within three quarters of an hour; the microscopic examination showed plainly that it had not begun to dissolve, or at least, only a very slight degree, and it indicated that the process of digestion had not gone on to any extent at the time this girl was rendered unconscious at any rate. I wish further to state that on examining Mary Phagan's stomach I found that the starch she had eaten had undergone practically no alteration; there were a few of the starch cells which showed the beginning of the process of digestion, having changed into the substance called erthro-dextrine, but these were very much rarer than is the case in a normal stomach where the contents are exposed to the actions of the digestive fluids for something like, say 50 or 60 minutes. The contents taken from the little girl's stomach were examined chemically, and the result of the chemical examination showed that there were only slight traces of the first action of the digestive juices on the starch, thus confirming my microscopic examination, and showed clearly that only the very beginning of digestion had proceeded in this case.

"As I was saying, of even greater importance in this matter, it was found that there were 160 cubical solids, or about five and a half ounces of total contents remaining in the stomach, and after an ordinary meal of cabbage and bread, this is not the case. Under ordinary conditions, we get out perhaps on an average of something like anywhere from 50 to 60 or 70 cubic centimeters, or, say from a half to a third of what was found in this case, and it was plainly evident that none of this material had gone into the small intestine, because that was examined for it from the mouth out to the beginning of the large intestine, which is many feet away from it in the neighborhood of something like 25 feet away, and there was very, very little food found in the small intestine, none at all, as a fact, in the small intestine, which showed clearly, as I have said, that the contents of the stomach had not begun to be pushed on into the small intestine at the time that death occurred. This pushing on begins in about half an hour after such a meal as this, and by the time an hour is reached, the greater part of what is introduced into the stomach is already down in the small intestine, so that it becomes very clear from this that digestion had not proceeded to any extent at all."

The above testimony of Dr. Harris was objected to when offered because the same was argumentative. It was not, as movant contends, a statement of fact, scientific or otherwise, from which the jury could for themselves draw conclusions, but was a mixture of facts and arguments.

The Court declined to rule out this testimony, and declined to force the witness to abstain from arguments and state the facts. This argument of the witness was clearly prejudicial to the defendant and failure to rule out the testimony was error.

21. Because, the Court permitted the witness C. B. Dalton to testify over the objection of defendant, made when the evidence was offered and before cross examination, that the testimony was irrele-

vant, incompetent, immaterial and illegal, dealt with other matters than the issues on trial and was prejudicial to the defendant's case; that he knew Leo Frank, visited the National Pencil Co.'s plant and saw Frank there four or five times; that he was in the office of Leo Frank, that he has been there three or four times with Miss Daisy Hopkins, and at these times Frank was in his office; that the witness had been in the basement, going down the ladder, that Frank knew he was in the building, but does not know whether Frank
59 knew he was in the basement; that he saw Conley there when he went there; that sometimes when he saw him in his office there would be ladies there, sometimes there would be two and sometimes one; he did not know how often he saw Conley there, but sometimes he would give him a quarter, that he did that a half dozen or more times; that he went to the factory about once a week for a half dozen weeks, that he saw Frank there in the evenings and in the day times; sometimes he would see cold drinks in the office, Coca-Cola, lemon limes, etc., that sometimes he saw beer in the office, that he never saw ladies there when beer and cold drinks were there do anything and never saw them do any writing.

The Court permitted this testimony of Dalton to be heard over the objections made as aforesaid and for such reason committed error.

This evidence was peculiarly prejudicial to the defendant because the solicitor insisted, in his argument, that in addition to being independent testimony looking to the same end, that it corroborated the testimony of Conley as to immoral conduct on the part of Frank.

22. Because the Court permitted the witness C. B. Dalton to be asked the following questions and make the following answers, over the objection of the defendant made at the time the evidence was offered, and before cross examination, that the testimony was irrelevant, incompetent, immaterial, and illegal, dealt with other matters and things than the issues of the trial, was prejudicial to the defendant.

Q. Mr. Dalton, have you ever worked at the pencil factory?
A. No, sir.
Q. Do you know Leo M. Frank?
A. Yes, sir.
Q. Do you know Daisy Hopkins?
A. Yes, sir.
Q. Do you know Jim Conley?
A. Yes, sir.
Q. Have you ever visited the National Pencil Factory?
A. Yes, sir; I have been there some.
Q. How many times?
A. I don't know; three, or four, or five times.
Q. Were you ever in the office of Leo M. Frank?
A. Yes, sir.
Q. On what occasion?
A. I have been there two or three times with Miss Daisy.
Q. Where was Frank when you were there?

A. He was in the office; I don't know whose office it was, but he was in the office.

Q. Were you ever down in the basement?

A. Yes, sir.

Q. What part of the basement did you visit? Can you tell me on that diagram (indicating)?

A. I have been down that ladder.

60 Q. (Looked at No. 12.) Did Frank have any knowledge of your business down there?

A. I don't know; he knowed I was in the basement; he knowed I was there.

Q. Was Conley there when you were there?

A. Yes, sir; I seen Conley there, and the night-watchman, too—he wasn't Conley.

Q. At the time you saw Frank there was anybody else in the office with him?

A. Yes, sir; there would be some ladies there; sometimes two and sometimes one, maybe they didn't work in the morning and would be there in the evening.

Q. How many times did you pay Jim Conley anything?

A. I don't know.

Q. About?

A. Gave him a quarter when I was going in sometimes; I expect I gave him a half dozen or more—about every week.

Q. What time of day or night was it that you saw Mr. Frank in his office?

A. It was in the evening—in the day time, sorter.

Q. What, if anything, would he have up there at the time?

A. Sometimes he would have cool drinks.

Q. What kind of drinks?

A. Coca-Cola, lemon lime, or something of that sort.

Q. What else?

A. Some beer, sometimes.

Q. Some beer?

A. Yes, sir.

Q. Were those ladies doing any stenographic work up there?

A. I never seed them doing any writing. I never stayed there long, but I never seed them doing any writing.

Q. You never saw anything of that kind going on?

A. No, sir.

The Court permitted these questions and answers to be heard by the jury, over the objection of the defendant, aforesaid, and committed error, for the reasons aforesaid. His evidence was particularly prejudicial to the defendant, because the solicitor insisted in his argument that it corroborated the testimony of Conley as to immoral conduct on the part of Frank.

The Court erred for the reasons above stated in not ruling out and excluding from the jury each and all of the above questions and answers.

23. Because the Court permitted, over the defendant's objection, made when the testimony was offered, that it was illegal, immaterial,

and because it could not be binding on the defendant, the witness S. L. Rosser, to testify that since April 26, 1913, he had been engaged in connection with this case; that he visited Mrs. Arthur White subsequent to April 26; that the first time the witness ever claimed to have seen the negro at the factory when she went into the factory on April 26th, was some time about the 6th or 7th of May.

The Court, over objections as stated, admitted the testimony just above, and in doing so erred, for the reasons herein stated.

This was particularly prejudicial to the defendant, because the solicitor contended in his argument to the jury that the fact
61 that factory employees did not disclose the fact that Mrs. White saw the negro on April 26th, was evidence that the defendant was seeking to suppress testimony material to the discovery of the murderer.

24. Because, during the trial, and on August 6, 1913, pending the motion of defendant's counsel to rule out the testimony of the witness Conley tending to show acts of perversion on the part of the defendant and acts of immorality wholly disconnected with and disassociated from this crime. (Such evidence being set out and described in grounds 13 and 14 of this motion.)

The Court declined to rule out said testimony, and immediately upon the statement of the Court that he would let such testimony remain in evidence before the jury, there was instant, pronounced and continuous applause throughout the crowded court room wherein the trial was being had, by clapping of hands and by stamping of feet upon the floor.

The jury was not then in the same room wherein the trial was being had, but in an adjacent room not more than fifty feet from where the judge was sitting and not more than fifteen or twenty feet from portions of the crowd applauding, and so close to the crowd, in the opinion of the Court, as to probably hear the applauding.

Immediately upon said applauding the defendant's counsel moved the Court for a mistrial of the cause; and, upon the announcement of the Court that he would not grant a mistrial, moved the Court to clear the Court-room, so that other demonstrations could not be had.

The Court refused to grant a mistrial and declined to clear the court-room.

In refusing a mistrial and in declining to clear the court-room, the Court erred. The passion and prejudice of those in the crowded court-room were so much aroused against the defendant, as contended by counsel for the defendant, that he could not obtain a fair and impartial trial.

The Court, as movant contends, also erred in not clearing the court-room of the disorderly crowd, but left them in the court-room, where their very presence was a menace to the jury.

It is true that the Court did threaten that upon a repetition of such disorder he would clear the court-room, but such a threat, as movant contends, was wholly inadequate, as evidenced by the fact

that during the same day of the trial, while witness Harris was upon the stand, the crowd laughed jeeringly when Mr. Arnold, one of the defendant's counsel, objected to a comment of the solicitor, and that, too, in the presence of the jury.

And again, during the trial, when Mr. Arnold, one of the defendant's counsel, objected to a question asked, the following colloquy took place:

Mr. ARNOLD: I object to that your Honor; that is, entering the orders on that book merely; that is not the question he is asking now at all.

The COURT: "What is the question he is asking now?" (Referring to questions asked by the Solicitor-General.)

Mr. ARNOLD: "He is asking how long it took to do all this work connected with it." (Referring to work done by Frank the day of the murder.)

62 The COURT: "Well, he knows what he is asking him."

Upon this suggestion of the Court, that the Solicitor knew what he was doing, the spectators in the court-room applauded, creating quite a demonstration.

Mr. Arnold again complained of the conduct of the spectators in the court-room. The Court gave no relief, except directing the Sheriff to find out who was making the noise, to which the Sheriff replied that he could maintain order only by clearing the court-room.

25. Because the Court erred in admitting, over the defendant's objection, made at the time the testimony was offered, that it was illegal, immaterial and irrelevant, the introduction of certain glass bottles containing partly digested cabbage, which resulted from tests made on other parties by the witness, Dr. Harris, wherein the cabbage which he claimed to be cooked the same as was the cabbage eaten by Mary Phagan, after it had remained in the stomach of such other parties from 30 to 50 minutes were taken out by means of a stomach pump.

The purpose of these experiments was to show the state of digestion of this cabbage in comparison with the state of digestion of the cabbage taken from the stomach of Mary Phagan, so as to sustain the contention of the State that Mary Phagan was killed within 30 or 40 minutes after eating the cabbage and bread.

The Court admitted these samples of partly digested cabbage taken from the stomach of others, as aforesaid, and in doing so, committed error for the reasons above stated, and for the further reason that there was no evidence, as the defendant's counsel contend, that the same circumstances and conditions surrounded these other parties in the eating and digestion of the cabbage as surrounded Mary Phagan in the eating and digestion on her part and no evidence that the stomachs of these other parties were in the same condition as was Mary Phagan's.

26. Because the Court, in permitting the witness, Harry Scott, to testify over the objection of defendant, made at the time the testimony was offered, that same was irrelevant, immaterial and not binding upon the defendant, that he did not get any information

from anyone connected with the National Pencil Company that the negro Conley could write, but that he got his information as to that from entirely outside sources, and wholly disconnected with the National Pencil Company.

The Court permitted this testimony to be given over the objections above stated, and in doing so, for the reasons therein stated, committed error.

This was prejudicial to the defendant, because the negro Conley at first denied his ability to write and the discovery that he could write was as the State contended, the first step towards connecting Conley with the crime, and the Solicitor contended in his argument to the jury that the fact that the Pencil Company authorities
63 knew Conley could write and did not disclose that to the State authorities, was a circumstance going to show the guilt of Frank.

27. Because the Court permitted the witness, Harry Scott, to testify over the objection of defendant's counsel, made when the testimony was offered, that the same was irrelevant, immaterial, illegal and not binding on the defendant, that the witness first communicated Mrs. White's statements about seeing a negro on the street floor of the pencil factory on April 26, 1913, to Black, Chief Lanford, and Bass Rosser, that the information was given to the detectives on April 28th.

The Court, over the defendant's objections, permitted the above testimony to be given, and in doing so erred for the reasons above stated. This was prejudicial to the defendant, because it was contended by the State that this witness, Harry Scott, who was one of the Pinkerton detectives who had been employed to ferret out the crime, by Frank acting for the National Pencil Company, had not promptly informed the officials about the fact of Mrs. White's seeing this negro and that such failure was evidence pointing to the guilt of Frank.

This witness was one of the investigators for the Pinkerton Detective Agency, who was employed by Frank acting for the National Pencil Company to ferret out this crime.

28. Because the Court permitted Harry Scott, a witness for the State, to testify over the objection of the defendant, made at the time that same was offered, that the same was irrelevant, immaterial, illegal and prejudicial to the defendant; that the witness, in company with Jim Conley, went to the jail and made an effort to see Frank. And that after Conley made his last statement (the statement about writing the notes on Saturday) Chief Beavers, Chief Lanford and the witness went to the jail for the purpose of confronting Frank. That Conley went with them; that they saw the Sheriff and explained their mission to him and the Sheriff went to Frank's cell; that the witness saw Frank at the jail on May 3rd (Saturday), and that Frank refused to see Conley only through Sheriff Mangum; that was all.

The Court, in admitting this testimony over the objections made, erred for the reasons stated above. This was error prejudicial to the defendant, because the witness Mangum, over the defendant's objec-

tion, had already been allowed to testify that Frank declined to see Chief Lanford, Chief Beavers, the witness and Conley, except with the consent of his counsel or with his counsel; and the Solicitor in his argument asserted that the failure of Frank to see the witness while he was employed by the Pencil Company to ferret out the crime in the presence of the negro and the two chiefs, was strong evidence of his guilt.

29. Because J. M. Minar, a newspaper reporter for the Atlanta Georgian, was called by the defendant for the purpose of im-
64 peaching the witness George Epps who claimed that on Saturday of the crime he accompanied Mary Phagan from a point on Bellwood Avenue to the center of the city of Atlanta, by showing that on April 27th at the house of Epps, he asked George, together with his sister, when was the last time they saw Mary Phagan. In reply, the sister of Epps said she had seen Epps on the previous Thursday, but the witness Epps said nothing about having come to town with Mary Phagan the day of the murder but did say he had ridden to town with her in the morning of other days occasionally.

Upon cross examination, over the objection of defendant's counsel made when the cross examination was offered, that the same was irrelevant, immaterial, incompetent, prejudicial to the defendant, and not binding on the defendant, the witness was allowed to testify that he went to the house of Epps in his capacity of reporter; that one Clofine was the City Editor and that the witness was under him and that Clofine was a constant visitor of Frank at the jail.

The Court admitted this testimony over the objections aforesaid and in doing so erred. There was no evidence of any relationship between Frank and Clofine which could show any prejudice or bias in Frank's favor, even by Clofine and certainly none on the part of the witness Miner.

30. Because the Court erred in permitting the witness Schiff, to testify over the objection of defendant made at the time the testimony was offered, that the same was incompetent, irrelevant and immaterial, that it was not Frank's custom to make engagements Friday for Saturday evening, then go off and leave the financial sheet that had to be over at Montag's Monday morning not touched.

The Court permitted this testimony over the objection of defendant and therein erred, for the reasons stated.

This was prejudicial, because it was the contention of the State that Frank, contrary to his usual custom, made an engagement on Friday before the crime to go to the baseball game on Saturday afternoon, leaving the financial sheet unfinished, although such sheet ought to have been prepared on Saturday and sent to Montag's to the general manager of the factory on Monday. The only material issue was what took place Friday and Saturday and it was wholly immaterial as to what his custom previous to that time had been.

31. Because, during the trial the following colloquy took place between the Solicitor and the witness Schiff:

Q. Isn't the dressing room back behind these doors?
A. Yes, it is behind these doors.

Q. That is the fastening of that door, isn't it?
A. Yes.
Q. And isn't the dressing room back there then?
A. That isn't the way it is situated.
Q. It isn't the way it is situated?
A. It is not, no, sir.
65 Q. Why, Mr. Schiff, if this is the door right here and—
A. Mr. Dorsey I know that factory.
Q. Well, I am trying to get you to tell us if you know it; you have no objection to telling it, have you?

(Here objection was made by defendant's counsel that Schiff had shown no objection to answering the questions of the Solicitor and that such questions as the one next above, which indicated that the witness did object to answering was improper.)

Mr. DORSEY: I have got a right to show the feeling.
The COURT: Go on now, and put your questions.
Mr. DORSEY: Have you any objections to answering the question, Mr. Witness?
A. No, sir I have not.

These comments of the Solicitor, reflecting upon the witness were objected to and the Court urged to prevent such reflections. This the Court declined to do and allowed the Solicitor to repeat the insinuation that the witness was objecting to answering him.

This was prejudicial error. The witness deserved no such insinuations as were made by the Solicitor and in the absence of the requested relief by the Court, the jury was left to believe that the reflections of the Solicitor were just.

This witness was one of the main leading witnesses for the defendant, and to allow him, movant contends, to be thus unjustly discredited was harmful to the defendant.

32. Because the Court erred in declining to allow the witness Miss Hall to testify that on the morning of April 26th, and before the murder was committed, Mr. Frank called her over the telephone, asking her to come to the pencil factory to do stenographic work, stating at the time he called her that he had so much work to do that it would take him until six o'clock to get it done.

The defendant contends that this testimony was part of the res gestæ and ought to have been heard by the Court, and failure to do so committed error.

33. Because, while Philip Chambers, a youth of 15 years of age, and a witness for the defendant, was testifying, the following occurred:

Q. You and Frank were pretty good friends, weren't you?
A. Well, just like a boss ought to be to me.
Q. What was it that Frank tried to get you to do that you told Gantt about several times?
A. I never did complain to Mr. Gantt.
Q. What proposition was it that Mr. Frank made to you and told you he was going to turn you off if you didn't do what he wanted you to?

A. He never made any proposition to me.

Q. Do you deny that you talked to Mr. Gantt and told him about these improper proposals that Frank would make to you and told you that he was going to turn you off unless you did what he wanted you to do?

A. I never did tell Gantt anything of the sort.

66 (Objection was here made by the defendant that the answer sought would be immaterial.)

The COURT: Well, I don't know what it is, ask him the question.

Q. Didn't you tell Gantt the reason why Frank said he was going to turn you off?

A. No, sir.

Q. Didn't Frank tell you he was going to turn you off unless you would permit him to do with you what he wanted to do?

A. No, sir.

Q. No such conversation ever occurred?

A. No, sir.

Q. With J. M. Gantt, the man who was bookkeeper and was turned off there?

A. No, sir, I never told him any such thing.

Q. No such thing ever happened?

A. No, sir.

Mr. ARNOLD: Before the examination progresses any further, I want to move to rule out the witness said there wasn't any truth in it, but I want to move to rule out the questions and answers in relation to what he said Frank proposed to do to him—right now. I think it is grossly improper and grossly immaterial; the witness says there is no truth in it, but I move to rule it out.

Mr. DORSEY: We are entitled to show the relations existing between this witness and the defendant, your Honor.

Mr. ARNOLD: We move to rule out as immaterial, illegal and grossly prejudicial and as grossly improper, and the gentleman knows it, or ought to know it, the testimony that I have called your Honor's attention to.

The COURT: Well, what do you say to that, Mr. Dorsey? How is this relevant at all over objection?

Mr. DORSEY: We are always entitled to show the connection, the association, the friendship or lack of friendship, the prejudice, bias, or lack of prejudice and bias, of the witness, your Honor. You permitted them, with Conley, to go into all kinds of proposals to test his memory and to test his disposition to tell the truth, etc. Now I want to lay the foundation for the impeachment of this witness by this man Gantt to whom he did make these complaints.

The COURT: Well, I rule it all out.

Mr. ARNOLD: It is the most unfair thing I have ever heard of, to try to inject in here in this illegal way, this kind of evidence; any man ought to know that it is illegal. It has no probative value, and has been brought in here by this miserable negro and I don't think any sane man on earth could believe it. It is vile slander and fatigues the indignation to sit here and hear things like this sug-

gested, things that your Honor and everybody knows are incompetent.

The COURT: Well, I sustain your objection.

Mr. ARNOLD: If the effort is made again, your Honor, I am going to move for a mistrial. No man can get a fair trial with such inuendoes and insinuations as these made against him.

The COURT: Have you any further questions, Mr. Dorsey?

Mr. DORSEY: That is all I wanted to ask him. I will bring Gantt in to impeach him.

The COURT: Well, I have ruled that all out.

Mr. DORSEY: Well, we will let your Honor rule on Gantt, too.

67 The assertion by the solicitor that this witness did make the suggested complaints to Gantt, the insinuations involved in the questions of the solicitor that Frank had committed disgraceful and prejudicial acts with the witness and the final assertion of the solicitor when the Court ruled it out that he would introduce Gantt and let the Court rule on Gantt too, was highly prejudicial to the defendant. The Court erred in permitting the solicitor to make the insinuations and to indulge in the threat that he would let the Court rule on Gantt too, in the presence of the jury and without any rebuke on the part of the Court. The Court erred in not formally withdrawing these insinuations and assertions from the jury and in not of his own motion severely rebuking the solicitor for his conduct. The mere ruling out of the testimony was not sufficient. Nothing but a severe rebuke to the Solicitor-General would have taken from the jury the sting of the insinuations and threats of the solicitor.

34. Because, while Mrs. Freeman was on the stand, after testifying as to other things she testified that while she and Miss Hall, on April 26th, were at the restaurant immediately contiguous to the pencil factory, and after they had left the factory at 11:45 o'clock, a. m., and had had lunch, that Lemmie Quinn came in and stated that he had just been up to see Mr. Frank.

Upon motion of the solicitor this statement that he had been up to see Mr. Frank was ruled out, as hearsay.

This statement of Lemmie Quinn was a part of the res gestæ and was not hearsay evidence and was material to the defendant's cause. Lemmie Quinn testified that he saw Mr. Frank in his office just before he went down to the restaurant and had the conversation with Mrs. Freeman and Miss Hall; this testimony was strongly disputed by the solicitor. Lemmie Quinn's statement that he was in Frank's office just before going into the restaurant was of the greatest moment to the defendant, because it strongly tended to dispute the contention of the State that Mary Phagan was killed between twelve and half past.

The Court erred in ruling out and declining to hear this, for the reasons above stated. The testimony was relevant, material, and part of the res gestæ, and should have been sent to the jury.

35. Because the Court permitted, at the instance of the Solicitor-General, the witness Sig Montag to testify over the objection of the defendant, made when same was offered, that same was irrelevant,

immaterial, incompetent; that the National Pencil Company employed the Pinkertons; that the Pinkertons have not been paid, but have sent in their bills; that they sent them in two or three times; that, otherwise, no request has been made for payment, and that Pierce, of the Pinkerton Agency, has not asked the witness for pay.

In permitting this testimony to go to the jury, over the objections above stated, the Court erred.

The introduction of this evidence was prejudicial to the defendant, for the reason that the solicitor contended that the pay due the Pinkertons by the Pencil Company was withheld for the purpose of affecting the testimony of the agents of that company.

68 36. Because the Court permitted, at the instance of the solicitor the witness Sig Montag, to testify over the objection of defendant, made at the time the testimony was offered that same was irrelevant, immaterial, and incompetent, that he got the reports made on the crime by the Pinkertons and that they were made. That these reports came sometimes every day and then they did not come for a few days and then came again. That he practically got every day's report; that he got the report about finding the big stick and about the finding of the envelope, that he got them pretty close after they were made; that he knew about them having the stick and the envelope when he read the report. That he did not request Mr. Pierce, representing the Pinkertons, to keep from the police and the authorities the finding of the stock and the envelope.

The Court, over the objections of the defendant, on the grounds stated, permitted this testimony to go to the jury and in doing so erred.

This was prejudicial to the defendant because the solicitor insisted that the finding of the envelope and stick were concealed from the authorities.

37. Because the Court erred in permitting the witness Leech, a street car inspector, at the instance of the solicitor and over the objections of the defendant that same was irrelevant, immaterial, and incompetent, to testify that he had seen street car men come in ahead of their schedule time. That he had seen that often and had seen it last week. That he, Leech, had suspended a man last week for running as much as six minutes ahead of time. That he suspends them pretty well every week and that he suspends a man for being six minutes ahead of time just like he would for being six minutes late. It frequently happens that a street car crew comes in ahead of time and that they are given demerits for it and that he sometimes suspends them for it. That the street car crews are relieved in the center of town; that sometimes a crew is caught ahead of time when they are going to be relieved. That it is not a matter of impossibility to keep the men from getting ahead of time, although that does happen almost every day. That there are some lines on which the crew does not come in ahead of time because they can not get in. It frequently happens that the English Avenue car cuts off the River car and the Marietta car. It often happens that these cars are cut off. That when there is a procession or anything moving through town, it makes the crew anxious to get through town, that they are

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punished just as much for coming in ahead of time even a day like that as they would be any other day. They do their best to keep the schedule, but in spite of it they sometimes get off.

The Court permitted the testimony of the witness Leech over the objection of the defendant that the same was irrelevant, immaterial and incompetent, and in doing so committed error.

This was prejudicial to the defendant, because the crew on the English Avenue car upon which the little girl, Mary Phagan, came to town, testified that she got on their car at ten minutes to twelve.

That under their schedule they should reach the corner of
69 Broad and Marietta Streets at 7½ minutes past twelve. That they were on their schedule time on April 26th and did reach that place at 12:07 or 12:07½. What other crews did at other times or even what this crew did on other occasions was wholly immateril, and in no way illustrated just what took place on the trip wherein Mary Phagan came to town. That other crews often came in ahead of time or that this particular crew often came in ahead of time was wholly immaterial.

38. Because during the examination by Mr. Arnold, counsel for the defendant, of V. H. Kreigshaber, a witness for the defendant, there was laughter in the audience, sufficiently generally distributed throughout the audience and loud enough to interfere with the examination. The testimony elecited from Kreigshaber was that Frank was a young man, and that Kreigshaber was older, but he didn't know how much older. Mr. Arnold called the Court's attention to the interruption for the purpose of obtaining some action from the Court thereon.

The Court stated that if there was other disorder no one would be permitted in the court room on the following day and requested the Sheriff to maintain order.

The defendant says that the Court erred in not then taking radical steps to preserve order in the court room and to permit the trial to proceed orderly and that a threat to clear the court room upon the following day and the request for the Sheriff to keep order was not sufficient for the purpose.

This was prejudicial to the defendant, because the laughter was directly in derision of the defendant's defense being made by his counsel.

39. Because the Court permitted, at the instance of the Solicitor, the witness Milton Klein to testify, over the objection of the defendant, made when the evidence was offered, that the same was immaterial, as follows:

"When the witness Conley was brought to the jail Mr. Roberts came to the cell and wanted Frank to see Conley. I sent word through Mr. Roberts that Frank didn't care to see him. Mr. Frank knew that the detectives were down there and afterwards they brought Conley up there and of course Mr. Frank knew he was there. I knew and Mr. Frank knew he was there. Mr. Frank was at one side and I acted as spokesman. Mr. Frank would not see any of the city detectives. Frank gave as his reason for refusing to see Conley with the detectives that he would see him only with

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the consent of Mr. Rosser, his attorney. I do not know whether Mr. Frank sent and got Mr. Rosser or not. I told the detectives about sending and getting Mr. Rosser's consent. I think Mr. Goldstein was there and Scott and Black and a half-dozen detectives, a whole bunch of them. I was there only once when Conley was there, that was the time when Conley swore he wrote the notes on Friday. When Conley came up there with the detectives, Frank's manner, bearing and deportment were natural. He considered Conley in the same light he considered any other of the city detectives. I know that because I conferred with him about it and he said he would not see any of the city detectives without the consent of Mr. Rosser; he considered Scott as working for the city at that time. I sent word that he would not receive any of the city detectives, Black or anyone of the rest of them. Frank considered Scott with the rest of them, including him with the city detectives.
70 He would not see anyone of the city detectives and that included Scott. Frank did not tell me that, the inference was mine. Frank merely said he would receive none of the city detectives without Mr. Rosser's consent, that was the substance of his conversation. Mr. Roberts came up and announced the city detectives; this was at Frank's cell in the county jail."

The Court permitted this testimony to go to the jury over the objections made as above stated, and in doing so committed error.

This was especially prejudicial to the defendant, because the Solicitor, in his argument to the jury stressed and urged upon the jury that this failure of the defendant to, as he expressed it, face this negro Conley and the detectives, even in the absence of his own counsel, was evidence of guilt.

40. Because the Court permitted Miss Mary Pirk to be asked the following questions and to make the following answers on cross examination made by the Solicitor:

Q. You never heard of a single thing immoral during that five years—that's true? (Referring to the time she worked at the pencil factory.)

A. Yes, sir, that's true.

Q. You never knew of his (Frank's) being guilty of a thing that was immoral during those five years—is that true?

A. Yes, sir.

Q. You never heard a single soul during that time discuss it?

A. No, sir.

Q. You have never heard of his going in the dressing rooms there of the girls?

A. No, sir.

Q. You never heard of his slapping them as he would go by?

A. No, sir.

Q. Did you ever see Mr. Frank go back there and take Mary off to one side and talk to her?

A. I never seen it.

Q. That never occurred?

A. I have never seen it.

Q. You never heard about the time that Frank had her off in the corner there, and she was trying to get back to her work?
A. No, sir.
Q. You didn't know about that?
A. No, sir.
Q. That was not discussed?
A. No, sir.

These questions were asked over the objection of the defendant, because even if the Solicitor's questions brought out that the witness had heard charges of immorality against Frank, that her answers thereabout would have been irrelevant and immaterial in this trial of Frank for murder. The fact that Frank might have been frequently guilty of immorality could not be held against him on a trial for the murder of Mary Phagan. Nor, could acts of immorality with women be heard, even on cross examination, as evidence of bad character and reputation, upon Frank's trial for the murder of Mary Phagan. Lasciviousness is not one of the character
71 traits involved in a case of murder and can not be heard in a murder trial, even when the defendant has put his character in issue.

41. Because the Court permitted the witness W. D. McWorth to testify, at the request of the Solicitor-General, over the objection of the defendant made at the time the testimony was offered, that the same was immaterial.

"Mr. Pierce is the head of the Pinkerton office here. I do not know where he is; the last time I saw him was Monday evening, I do not know where Mr. Whitfield is (Mr. Whitfield was also a Pinkerton man). I saw him the last time Monday afternoon. I do not know whether Pierce and Whitfield are in the city or not."

The Court admitted this testimony over the objections of the defendant, made at the time the testimony was offered, for the reasons stated and in so doing committed error. This was especially prejudicial to the defendant. Pierce and Whitfield were part of the Pinkerton's force in the city of Atlanta and the inference of the solicitor was that he wished their whereabouts to be shown, upon the theory that the Pinkertons were employed by Frank for the National Pencil Company and that a failure on the part of Frank to produce them would be a presumption against him, as he stated it, upon the well-known principle of law that if evidence is shown to be in the possession of a party and not produced, it raises a presumption against them.

42. Because the Court permitted McWorth, at the instance of the Solicitor-General to testify over the objections of the defendant, made when the evidence was offered, that the same was irrelevant, immaterial and illegal:

"I reported it (the finding of the club and envelope) to the police force about 17 hours afterwards. After I reported the finding, I had a further conference with the police about it about four hours afterwards. I told John Black about the envelope and the club. I turned the envelope and club into the possession of H. B. Pierce."

The Court heard this testimony over the objection of the defend-

ant, made as above stated, and in doing so committed error, for the reasons herein stated.

This was prejudicial to the defendant, because the Solicitor-General contended that his failure to sooner report the finding of the club and the envelope to the police were circumstances against Frank. These detectives were not employed by Frank, but by Frank for the National Pencil Company, and movant contends that he is not bound by what they did or failed to do. The Court should have so instructed the jury.

43. Because the court permitted the witness Irene Jackson, at the instance of the Solicitor-General and over the objection of the defendant, that the testimony was irrelevant, immaterial, illegal, to testify as follows:

Q. Do you remember having a conversation with Mr. Starnes about something that occurred.

A. Yes, sir.

Q. Now what was that dressing room incident that you told him about that time?

A. I said she was undressing.

72 Q. Who was undressing?

A. Ermilie Mayfield, and I came in the room, and while I was in there, Mr. Frank came to the door.

Q. Mr. Frank came in the door?

A. Yes, sir.

Q. What did he do?

A. He looked and turned around and walked out.

Q. Did Mr. Frank open the door?

A. Yes, he just pushed it open.

Q. Pushed the door open?

A. Yes, sir.

Q. And looked in?

A. Yes, sir.

Q. And smiled?

A. I don't know whether, I never notice to see whether he smiled or not, he just kind of looked at us and turned around and walked out.

Q. Looked at you, stood there how long?

A. I didn't time him; he just came and looked and turned and walked out.

Q. Came in the dressing room?

A. Just came to the door.

Q. Came into the door of the dressing room?

A. Yes.

Q. How was Miss Ermilie Mayfield dressed at that time?

A. She had off her top dress, and was holding her old dress in her hand to put it on.

Q. Now, you reported that to the forelady there?

A. I did not but Ermilie did.

Q. Now did you talk or not to anybody or hear of anybody except Miss Ermilie Mayfield talking about Mr. Frank going in the dressing room there when she had some of her clothes off?

A. I have heard remarks but I don't remember who said them, or anything about it?

(By Mr. ROSSER:)

Q. Was that before April 26th?
A. Yes, sir.
Q. Well, what was said about Mr. Frank going into the room, the dressing room?
A. I don't remember.
Q. Well, by whom was it said?
A. I don't remember.
Q. Well, how many girls did you hear talking about it?
A. I don't remember; I just remember I heard something about it two or three different times, but I don't remember anything about it, just a few times.
Q. Was that said two or three different times?
A. I said a few times, I said two or three times.
Q. How would the girls—she said she heard them talking about Mr. Frank going in the dressing room on two or three different occasions—well, you know you heard them discussing about his going in this dessing room on different occasions, two or three different occasions, did you?
A. Yes.
Q. That is what you said, wasn't it?
A. Yes, sir.
73 Q. Now when was it that he run in there on Miss Ermilie Mayfield?
A. It was the middle of the week after we had started to work, I don't remember the time.
Q. The middle of the week after you had started to work?
A. Yes, sir.
Q. Was that the first time you ever heard of his going in the dressing room, or anybody?
A. Yes.
Q. That was the first time?
A. Yes, sir.
Q. Then that was reported to this forelady?
A. Yes, sir.
Q. Then when was the second time that you heard he went in there?
A. He went in there when my sister was lying down.
Q. Your sister was lying down, in what kind of position was your sister?
A. She just had her feet up on the table.
Q. Had her feet up on the table?
A. Had them on a stool, I believe, I don't remember.
Q. A table or stool?
A. Yes, sir.
Q. Was she undressed or dressed?
A. She was dressed.
Q. She was dressed; do you know how her dress was?

A. No, sir, I didn't look.
Q. You don't know that, you were not in there?
A. Yes, sir, I was in there, but I didn't look.
Q. Well, now, what did Mr. Frank do that time?
A. I didn't pay any attention to it, only he just walked in and turned and walked out, looked at the girls that were sitting in the window, and walked out.
Q. What did the girls say about that?
A. I don't remember.
Q. Did they talk about it at all?
A. There was something said about it, but I don't remember.
Q. Well now did you or not hear them say that he would go in that room and stand and stare at them?
A. Yes, sir, I have heard something, but I don't remember exactly.
Q. You heard that; how often did you hear that talked?
A. I don't remember.
Q. You don't remember how often you heard them say he walked in there and stood and stared at them?
A. I don't remember.
Q. You don't remember that; well now, you said about three times those things occurred, and you have given us two, Miss Mayfield and your sister, what was the other occasion?
A. Miss Mamie Kitchens.
Q. Miss Mamie Kitchens?
A. Yes, sir.
Q. Mr. Frank walked in the dressing room on Miss Mamie Kitchens?
A. We were in there, she and I.
Q. You were in there and Mr. Frank came in there?
A. Yes, sir.
Q. So that was the three times you know of yourself?
A. Yes, sir.
74 Q. Then did you hear it talked of?
A. I have heard it spoken of, but I don't remember.
Q. You have heard them speak of other times when you were not there, is that correct?
A. Yes, sir.
Q. How many times when you were not there? That is three times you saw him; how many times did you hear them talk about it when you were not there?
A. I don't remember.
Q. What did they say Mr. Frank did when he would come in that dressing room?
A. I don't remember.
Q. Did he say anything those three times when you were there?
A. No, sir.
Q. Was the door closed?
A. It was pushed to, but there was no way to fasten the door.
Q. Pushed to, but no way to fasten it?
A. No, sir.
Q. He didn't come in the room?

A. He pushed the door open and stood in the door.
Q. Stood in the door, what kind of a dressing room was that?
A. It was—just had a mirror in it; you mean to describe the inside?
Q. Just describe it; was it all just one room?
A. Yes, sir, and there were a few lockers for the foreladies.
Q. A few lockers around the walls, a place where the girls changed their street dress and got into their working dress, and vice-versa?
A. Yes, sir.
Q. Now, what else did you ever see that Mr. Frank did except go in the dressing room and stare at the girls?
A. Nothing that I know of.
Q. When Mr. Frank opened the door, there was no way he could tell before he opened the door what condition the girls were in, was there?
A. No, sir.

(By Mr. ARNOLD:)

Q. He didn't know they were in there, did he?
A. I don't know.
Q. That was the dressing room and the usual hour for the girls to attend the dressing room, wasn't it?
A. Yes, sir.
Q. Undressing and getting ready to go to work?
A. Yes, sir.
Q. Changing their street clothes and putting on their working clothes, that is true, Miss Jackson?
A. Yes, sir.
Q. That was the usual hour; you had all registered on or not, before you went up into this dressing room?
A. Yes, sir.
Q. And Mr. Frank knew the girls would stop there?
A. Yes, sir.
Q. After registering?
A. Yes, sir.
Q. Now, did you hear or not any talk about Mr. Frank going around and putting his hands on the girls?
A. No, sir.
Q. Was that before or after he had run in the dressing room?
A. I don't remember.
75 Q. Well, he pushed the door open and stood in the door, did he?
A. Stood in the door.
Q. Looked in and smiled?
A. Yes, sir.
Q. Didn't you say that?
A. I don't remember now, he smiled or made some kind of a face which looked like a smile, like smiling at Ermilie Mayfield.
Q. At Ermilie Mayfield, that day she was undressed?
A. But he didn't speak, yes sir.
Q. He didn't say a word, did he?
A. No, sir.

Q. Did he say anything about any flirting?

A. Not to us, no, sir.

These questions and answers were objected to for the reasons above stated, and for the further reason that a statement showing improper conduct of Frank in going into the dressing rooms with girls, while improper, was intended to create prejudice against him and in no way elucidated the question as to whether he was or was not the murderer of Mary Phagan.

Movant contends that the act that the defendant had put his character in issue is no reason why reported or actual facts of immorality should be admitted in evidence over his objection. The defendant's reputation or character for immorality or loose conduct with women are not relevant subjects for consideration in determining whether the defendant has or has not a good character when such good character is considered in connection with a charge of murder.

44. Because the Court permitted the Solicitor to ask and have answered by the witness Harlee Branch the following questions, said questions and answers dealing with an incident occurring at the pencil factory, wherein Conley, after having made the third affidavit in the record purported to re-enact the occurrence between himself and Frank on April 26th, wherein the body of Mary Phagan was taken from the office floor to the cellar of the factory:

Q. Now, Mr. Branch, take this stick and that picture, and take up Conley now, and give every move he made?

A. Am I to give you the time he arrived there? (Pencil factory.)

Q. Yes, give the time he arrived.

A. I will have to give that approximately; I was to be there at 12 o'clock, and I was a few minutes late, and Conley hadn't arrived there then, and we waited until they brought him there, which was probably ten or fifteen minutes later; the officers brought Conley into the main entrance here and to the staircase, I don't know where the staircase is here—yes, here it is (indicating on diagram) and they carried him up there, and they told him what he was there for, and questioned him, and made him understand that he was to re-enact the pantomime.

Q. Just tell what Conley did?

A. After a few minutes conversation, a very brief conversation, Conley led the officers back here and turned off to his left to a place back here, I guess this is it (indicating on diagram) right where this is near some toilets, and he says:

76 Q. Go ahead.

A. He was telling his story as he went through there, and he said when he got up there, he went back and he said he found this body back in that place.

Q. Go ahead and tell what he said and did.

A. He was talking constantly all the time, I don't know how he made out a part of his story.

Q. Go ahead now, and state what Conley did and said as he went through that factory?

A. Well when he got back —. After reaching this point at the rear left side of the factory, described the position of the body, as he stated it, he stated the head was lying towards the north and the feet

towards the south, as indicated, and there was a cord around the neck.

Q. State what he said, what he said Mr. Frank did and said.

A. He didn't state how long it took for the various movements.

(By the COURT:)

Q. Did you time it?

A. No, sir, I know the time I arrived there and the time I left the factory.

Q. First, I want you to state what he said he did, and what he said Mr. Frank did, and then come up on the time business.

A. I don't quite understand what I am to do.

Q. Just go ahead and tell what Conley said he did, and what Conley said Mr. Frank said, and show what Conley did the day you were over there, take it up right back here where the body was and go on with it, leaving out, however, what he said about the cord and all that.

A. He said when he found the body, he came up to Mr. Frank, called to him from some point along here, I should judge (indicating on diagram), I don't understand this diagram exactly, and told him the girl was dead, and I don't know exactly what Mr. Frank said. I will try to eliminate as much of that conversation as I can. Anyhow, he said he came on up where Mr. Frank was, and that he was instructed to go to the cotton room, where he showed us, I don't know, it must be on the same side of the building, about here, I judge, (indicating) and he went in there, he showed us the cotton room, and he said he went back, and he did go back, lead us back, and told about taking up the body, how he brought it on up on his shoulder, and then in front of a little kind of impression of the wall, said he dropped it, and he indicated the place, and then he came up and told Mr. Frank about it, that he would have to come and help him, or something like that, and that Mr. Frank came back and took the feet, I believe, he said, and he took the head, and they brought the body up to the elevator and put it on the elevator.

(By the COURT:)

Q. Was he going through all that thing?

A. Yes sir, he was enacting this all the time, and talking all the time. He described how the body was put on the elevator, and he said Mr. Frank run the elevator down, and he went on down the elevator.

(By the COURT:)

Q. Did he go down in the elevator?

A. On this trip, yes, sir, he went down in the elevator to the basement, and he said Mr. Frank told him to take body out, and they dropped it there, and Mr. Frank told him to take it up and carry it back, and he put the body on his shoulder and carried it back to this sawdust which is away back here, and that he came on back and there was something in here which he said he threw on this trash pile, and Mr. Frank was up, he said, in the cubby hole, he said somewhere back there, and later he led us up there, and that Mr. Frank

told him to run the elevator up, so Conley and the officers and the rest of us who were with him came up on the elevator, and when they got to the first floor, just before getting to the first floor,
77 he said this was where Mr. Frank got on the elevator, Mr. Frank was waiting there for him; then they brought the elevator on up to the second floor, and he had them to stop the elevator just, I suppose, or a little more below the landing, and he said Mr. Frank jumped off when the elevator was about that point, and after getting up, he said Mr. Frank went around the elevator to a sink that he showed us back of the elevator, to wash his hands, and he waited out in front, and he said he shut off the power while Mr. Frank was gone around there, and when Mr. Frank came back, they went in the office, and he led us in the office through—there is an outer office there, and he come in this way, and come through in this office back there, this inner office, and he indicated Mr. Frank's desk and a desk right behind it, I presume this is the two desks (indicating) that Mr. Frank sat down in a chair at that desk, and he told him to sit at his other desk, and Mr. Frank told him to write some notes, and he was asked by some of the officers to write what Mr. Frank had told him to write, and he sat down there and wrote one note, and I believe—I know he wrote one note, and I don't know whether he wrote one or two, and that Mr Frank handed him some money and that later he took it back, and I don't remember whether he gave him the cigarettes and money before or after this, I don't recall. Anyway, when he was in there, after he had written the notes for the officers, I found it was time for me to get in the office with my copy, he hadn't finished, he was still sitting there, and I telephoned into the office for relief, someone to relieve me, and I went to the office, and I left him there in this office, and I went in.

Q. What time was it when Conley got there?

A. I should judge it was a quarter past twelve, I didn't look at my watch.

Q. A quarter past twelve, what time did you get there?

A. I must have gotten there five minutes before he did.

Q. Then what time did you leave?

A. I left about one o'clock.

Q. What time did he begin?

A. They rushed him right up the steps and probably two or three minutes after he got up there, he began this enactment, and he went very rapidly, in fact, we sort of trot to keep behind him.

Q. You say you did keep behind him, were any questions asked him during that?

A. Constantly, yes, sir.

Q. How many people were asking him questions.

A. Well, I suppose four or five of the officers.

Q. How much of the talking that Conley did have you cut out?

A. Well, I have cut out a good deal, I have no way of indicating how much.

Q. Well, did he do or not more talking that you have stated?

A. A great deal more.

Q. A great deal more? How much more would you say?

A. I have no way of estimating, he was talking constantly, except when he was interrupted by questions.

Q. Now, Mr. Branch, do you know the amount of time that Conley spent in this? First, you say you got there at a quarter past twelve, did you?

A. I didn't time it, but it must have been, because I was endeavoring to get there at twleve o'clock, and when I got to the office from police station, it was five or ten minutes after twelve, and I walked down just about a block and a half.

Q. And Conley got there at what time?

A. He came just, I should say, five minutes after I did, not longer than five minutes.

78 Q. Not longer than that, and he got there at 12:20, then; and what time did you go away?

A. I left a little after one.

Q. How much after one?

A. I do not know, probably five or ten minutes.

Q. One-ten then; now, how much of the time during that time you were there did it take Conley to act what he acted, leaving out the conversation he had with the different men?

A. That would be a difficult thing for me to estimate, while he was acting, he was acting very rapidly, he kept us on the run.

Q. All right; now, leave out now the time that it took this man to answer the questions that were put to him by yourself and other men that accompanied him through there, leave that out now and give us your best opinion as to how long it took Conley to go through that demonstration?

A. There was no way to do that, there was no way to dissociate the time, and find out the difference between the two, between the time he was acting and talking; I didn't attempt to do that; in fact, the only time I was interested in was the time I would have to get back to the office.

Q. You got to the office, you say about 1:10?

A. Yes, sir.

Q. What time, then, you say, about, you left the pencil factory?

A. I left the pencil factory between five and ten minutes after one.

Q. You left the pencil factory then at about 1:10?

A. Yes, between 1:05 and 1:10.

The defendant objected to this testimony, because (*a*) this so-called experiment made with Conley was solely an effort upon his part to justify his story; (*b*) the savings and acts of Conley, testified about as aforesaid were the savings and acts of Conley, not under oath, had and made without the right of cross examination, the net result of which is but a repetition of Conley's story to the jury, without the sanction of an oath, and without cross examination. That Conley went to the factory immediately after making his last affidavit; that that last affidavit is not the way he tells the story on the stand; that he tells it wholly differently on the stand; at least differently in many particulars; that it can not help the jury for Conley to go and illustrate that affidavit when he says now on the stand that much of it was a lie, and that it did not happen that way at all; that

this evidence was of another transaction, not binding on this defendant.

45. Because the Court declined to allow Dr. David Marx to give testimony in behalf of the defendant as to the character of the Jewish organization known as B'Nai Brith. Defendant's counsel stated at the time that Dr. Marx would testify that while the B'Nai Brith was an international Jewish charitable organization, its charity did not extend to giving aid to persons charged with a violation of the criminal law, as was Mr. Frank in this case.

The State objected to permitting Dr. Marx to make the answer sought, and the Court declined to permit the testimony to go to the jury.

79 46. Because the Court permitted the witness Mrs. J. J. Wardlaw, who before her marriage was Miss Lula McDonald, to be asked by the Solicitor-General the following questions and to make the following answers:

Q. You never knew of his improper relations with any of the girls at the factory?

A. No, sir.

Q. Now, did you ever, do you know, or did you ever hear of a girl who went with Mr. Frank on a street car to Hapeville the Saturday before Mary Phagan was murdered?

A. No, sir.

Q. On the same street car with Hermes Stanton and H. M. Baker and G. S. Adams?

A. No, sir.

Q. And about his putting his arm around her and trying to get her at various places to get off with him?

A. No, sir.

Q. And go to the woods with him?

A. No, sir.

Q. She was a little girl that got on at the corner of Forsyth and Hunter Streets, there where the car passes?

A. No, I don't know that.

Q. You never heard of it at all?

A. No, sir.

Q. The Saturday before?

A. No, sir.

Q. You say you have never heard of any act of immorality on the part of Mr. Frank prior to April 26, 1913?

A. No, sir, I did not.

Q. You never talked with Hermes Stanton or H. M. Baker, the conductor or motorman?

—. ——.

Q. I will put it that way then, you never heard that, the Saturday before little Mary Phagan met her death, Mr. Frank went out on the Hapeville car on which Hermes Stanton and H. M. Baker were in charge, and that he had his arm around the little girl, and that he endeavored at various places to get that little girl to get off the car and go to the woods with him?

A. No, sir.

Q. You never heard such a statement as that at all by anybody?

A. No, sir, I did not.

The defendant objected to the above questions made by the Solicitor-General, because while the witness denied any knowledge by hearsay or otherwise of the wrong asked about, the mere asking of such questions, the answers to which must have been irrelevant and prejudicial was harmful to the defendant, and the Court erred in permitting such questions to be asked, no matter what the answers were.

The Court further erred because, although the defendant had put his character in issue, the State could not reply by proof or reputation of improper or immoral conduct with women. The reputation for lasciviousness is not involved in that general character that is material where the charge is murder.

80 47. Because the Court permitted the witness, W. E. Turner, at the instance of the Solicitor and over the objection of the defendant made at the time the evidence was offered that same was irrelevant, immaterial and dealt with other matters than the issues involved, to testify:

"I saw Mr. Frank talking to Mary Phagan on the second floor of the factory about the middle of March. Frank was talking to her in the back part of the building. It was just before dinner. I do not know whether anybody was in the room besides Mr. Frank and Mary. After I went in there two young ladies came down and showed me where to put the pencils. Nobody was in there but Mr. Frank and Mary at the time I went in there. Mary was going to her work when Mr. Frank stopped to talk to her. Mary told him that she had to go to work. Mr. Frank was talking about he was the Superintendent of the pencil factory. He told her that he was the Superintendent of the pencil factory and that he wanted to speak to her and she told him she had to go to work and I never did hear any more replies from either one. I left just when she told him she had to go to work. Mary backed off and Frank went on towards her talking to her. That was before I left, was when she backed off, and the last words I heard him say was he wanted to talk to her. Mary did not stand still; she moved backward about 3½ feet. While she was going backwards Mr. Frank was talking to her and walking towards her. Mr. Frank said 'I am the superintendent of the pencil factory and I want to speak to you,' and Mary said, 'I have got to go to work.'"

The Court, over the objections made as is above stated, permitted this testimony to go before the jury and in so doing committed error, for the reasons above stated.

This was prejudicial to the defendant, because the transaction testified about was a transaction distinct from those making the issues in the present case, threw no light on that trial and tended to prejudice the jury against Frank upon the theory that he was seeking to be intimate with this little girl.

48. Because the Court erred in admitting to the jury, over the objection of defendant's counsel, made at the time the evidence was offered that the same was irrelevant, immaterial, dealt with collateral

matters to the confusion of the issues on trial, the following extracts from the minutes of the Board of Health of the State of Georgia:

"The President then addressed the Board at length on his reasons for thinking that the Secretary should be requested to resign, the subjects dealt with being too enormous and too lengthy to be included here in their entirety. After the President's address, the Board adjourned and reassembled again at four o'clock in the afternoon, at which time Dr. Harris' side of the controversy was heard."

"The President (of the Board, Dr. Westmoreland), then addressed the Board at length on his reasons for thinking that the Secretary should be requested to resign, the subjects dealt with being too numerous and too lengthy to be included here in their entirety. After the President's address, the Board adjourned and reassembled again at four o'clock in the afternoon, at which time Dr. Harris' side of the controversy was heard."

"The Secretary not having been present at what transpired following this was not in a position to take note as to the pro-
81 ceeding, but was informed by the members on adjournment that it was their wish that he should still continue as Secretary and Director of the Laboratory."

"The President then made a short statement in support of his protest against the Secretary, and reiterated some of the charges made at the previous meeting, and in addition, made objection against the Secretary's action in sending out antitoxine No. 64, which had been shown by tests made in Washington to be of less potency than it was originally labelled and also condemning the Secretary for replacing Dr. Paullin and personally taking up the investigation of the malarial epidemic around the pond of the Central of Georgia Power Company. The President then stated that he would publish the charges against the Secretary if the Board did not take such action regarding them as he thought right and proper. At the conclusion of the President's address, a talk was made by Mr. Doughty, in which he took exception to the former's attitude, and insisted—"

"At the conclusion of the President's address a talk was made by Mr. Doughty, in which he took exception to the former's attitude, and insisted that every member of the Board wished to do what was best for the State Board of Health and the people of Georgia, and that everyone connected with the Board of Health should be willing to bow to the decision of this body. He deprecated strongly the idea of giving to the press charges the publication of which could do no good, and which could only result in harm."

"On the President and Secretary being recalled an hour later, the President pro tem. Mr. Benedict, read the following resolution, which had been unanimously adopted by the Board on motion of Mr. Harbin, seconded by Dr. Brown, the resolution having been drawn by a committee appointed by the Board, consisting of Doctors Benedict, Taylor and Doughty."

"That the committee appointed to frame a resolution expressing the opinion of the Board with regard to the charges preferred against the Secretary by the President of the Board in a report to the

Governor, and upon which they are called upon to act, beg to report as follows:

"Resolved, That the members of the Board present, after carefully considering the charges and all evidence in its possession, unanimously agree that while there have been certain slight irregularities in the conduct of some departments of the laboratories of the State Board of Health, which should be corrected, these irregularities have not been so important in character or result as to call for or warrant the discontinuance of Dr. Harris as Secretary and director of laboratories as demanded by the President. The Board further directs that a copy of this resolution be transmitted to the Governor."

Following the reading of this resolution, Dr. Westmoreland tendered his resignation as President of the Board, a copy of which follows:

"ATLANTA, GA., Sept. 25th, 1911.

"To the members of the Georgia State Board of Health, Atlanta, Ga.

"GENTLEMEN: I hereby tender you my resignation to take effect at this meeting. Thanking you for the courtesies extended me, and for the honor conferred on me in the past, I am, very sincerely yours,

"W. F. WESTMORELAND, *President.*"

"Now, on pages 164 and 165; that is the letter to the Governor, adopted by the Board, and sent to his Excellency, John M. Slaton, Governor, Atlanta, Ga."

The Court admitted these extracts from the minutes over the objections of defendant, as above stated, and in so doing committed error for said reasons.

This was prejudicial to the defendant and took the minds of the jury from the issues on the trial and centered them upon a
82 medical row had between Dr. Westmoreland who had once been president of the State Board of Health and Dr. Harris, who had been and was its Secretary. This row between the doctors stated is utterly immaterial and irrelevant and was harmful to the defendant because it tended to discredit the testimony of Dr. Westmoreland who resigned from the Board and to sustain the testimony of Dr. Harris, who remained as Secretary of the Board after Dr. Westmoreland's resignation.

49. Because the court permitted the witness E. H. Pickett to testify over the objection made when the testimony was offered that it was wholly and entirely irrelevant, immaterial, incompetent, illegal, dealt with transactions between other parties, threw no light on the issues involved and did not bind the defendant, to testify:

"Minola McKnight at first denied that she had been warned by Mrs. Selig when she left to go to the solicitor's office on May 3rd not to talk about the case, that when asked she stated that she was on that date instructed not to talk. At first, Minola stated that her wages had not been changed by the Seligs, that she was receiving the same wages as before the crime. At first she said her wages hadn't been changed and then she said her wages had been raised,

just what I can't remember because it varied from one week to another; she said the Selig family had raised her wages. The only statement she made about Mrs. Frank giving her a hat was when she made the affidavit, we didn't know anything about that hat before."

The Court permitted this testimony to go to the jury over the objections above stated and therein erred. The Court stated that he admitted this testimony on the idea that the ground of impeachment for Minola McKnight had been laid.

This testimony was prejudicial to the defendant, because the Court in admitting it, left the jury to consider the statements of Minola McKnight, that Mrs. Selig had instructed her not to talk, that the Seligs since the crime had raised her wages; that Mrs. Frank had given her a hat.

50. Because the Court permitted the witness J. H. Hendricks to testify, at the instance of the solicitor and over the objection of the defendant, that the same was irrelevant, incompetent and immaterial, that:

"I am a motorman for the Georgia Railway & Power Company, running on April 26, 1913, on Marietta to Stock Yards and Decatur Street car. The Cooper and English Ave. run is on the same route from Broad and Marietta Street- to Jones Ave. Prior to April 26 1913, the English Ave. car with Mathes and Hollis on it did run to Broad and Marietta Streets ahead of time; how much ahead I can not say positively. About April 26th and subsequent thereto Mathes and Hollis, in charge of the English Ave. car, about twelve o'clock when they were due to get off at dinner did come in ahead of time. I have seen them two or three times ahead of time. At the time they were relieved, I got to Broad and Marietta streets about 12:06. When I would get there on schedule time, I don't know where Mathes and Hollis were, they should have been coming in. When Hollis would be at the corner of Broad and Marietta streets, and his car would not be there and my car would be on time, Hollis would leave Broad and Marietta street- for dinner on my car."

83 The Court permitted this testimony to go to the jury over the objections above stated and in doing so committed error for the reasons stated. Movant contends that this was prejudicial to the defendant because it was a material matter to determine at what time his car got to Marietta and Broad streets on the day of the murder, and it confused and misled the jury to hear testimony as to when he got there upon days other than the day of the murder.

51. Because the Court permitted the witness J. C. McEwen, at the instance of and over the objection of defendant that the same was immaterial, incompetent and irrelevant, to testify:

"I am a street car motorman. Previous to April 26th I ran on the Cooper Street route something like two years. On April 26th, 1913, I was running on Marietta and Decatur Streets. The Cooper Street car or English Ave. car run by Hollis and Mathias was due in town at seven minutes after the hour; the car I was running was due at 12:10. The White City car got into the center of town at five minutes after the hour. About April 26, 1913, the Cooper

Street car or English Ave. car frequently cut off the White City car due in town at 12:05. The White City car is due there before the English Ave. car; it is due five minutes after the hour and the Cooper Street car is due seven minutes after the hour. In order for the English Ave. car to cut off the White City car, the Cooper Street car would have to be ahead of time, that is, the English Avenue car would have to be ahead of time. If the White City car was on time at 12:05, the English Ave. car would have to get there before that time to cut it off. That happens quite often. I do know that the car that Mathis and Hollis were running did come into town ahead of time very often, especially if it is a relief trip. I have known it to be four or five minutes ahead of time."

The Court admitted this testimony over the objections above made and in doing so committed error for said reasons.

This was prejudicial to the defendant, because it was material to his defense to show, as sworn to by the conductor and motorman, that the English Ave. car reached the corner of Broad and Marietta streets at 12:07, and it misled the jury to admit evidence tending to show that at other times this same car run by Mathis and Hollis reached the city ahead of time.

Nor would it be material for the purpose of contradicting the motorman who swore that he did not run ahead of time any time for whether he ran ahead of time at other times would be immaterial, and a witness can be impeached only as to misstatements of fact material to the issues in the case.

52. Because the Court permitted, at the instance of the solicitor and over the objection of the defendant, made when the evidence was offered, that same was irrelevant, immaterial and incompetent, the witness Henry Hoffman, to testify as follows:

"I am an inspector for the Georgia Railway & Power Co. I know Mathis, the motorman who runs on the English Ave. car. He is under me a part of the day. He was under me on April 26th, from 11:30 a. m. to 12:07 p. m. Under the schedule, his car is due at the junction of Broad and Marietta Sts. at 12:07. Prior to the beginning of this trial, I have known Mathis' car to cut off the Fair Street car. Under the schedule for the Fair St. car, it arrives
84 in the center of town, junction of Broad and Marietta, at 12:05. At the time Mathis was running ahead of this Fair Street car, which is due at 12:05 at the junction of Marietta and Broad Sts., the Fair Street car would be on its schedule. I have compared my watch with Mathis' watch prior to April 26th. There was at times a difference of from 20 to 35 or 40 seconds. We were both supposed to carry the right time. When I compared my watch with Mathis' I suspect mine was correct, as I just had left it the day I looked at Mathis' watch, and mine was 20 seconds difference, and I had gotten mine from Fred Williams that day. His watch was supposed to compare with the one at the barn. I called Mathis' attention to running ahead of time once or twice that I know of. Men coming in on relief time at supper and dinner, coming to the junction of Broad and Marietta, customarily come in ahead of time."

The Court admitted this testimony over the objections above made, and in doing so committed error for said reasons.

This was prejudicial to the defendant, because it was material to his defense to show, as sworn to by the conductor and motorman, that the English Ave. car reached the corner of Broad and Marietta Streets at 12:07, and it misled the jury to admit evidence tending to show that at other times this same car run by Mathis and Hollis reached the city ahead of time.

Nor would it be material for the purpose of contradicting the motorman who swore that he did not run ahead of time any time, for whether he ran ahead of time at other times would be immaterial, and a witness can be impeached only as to misstatements of fact, material to the issues in the case.

53. Because the Court permitted the witness J. M. Gantt, over the objection of the defendant, made when the evidence was offered that the same was irrelevant and immaterial, to testify substantially as follows:

"The clocks of the pencil company were not accurate. They may vary all the way from three to five minutes in 24 hours."

The Court admitted this testimony over the objections made and in doing so committed error, for the reasons stated.

This was prejudicial to the defendant, because whether the clocks were or were not accurate on April 26th was material to his defense. The witness Gantt had not worked at the factory for three weeks and the fact that the clocks were not keeping accurate time three weeks before the trial was immaterial, and the evidence thereon tended to mislead and confuse the jury. Gantt had not worked at the factory during the three weeks just prior to the crime, and his testimony as to the clocks related to the time he did work at the factory.

54. Because the Court permitted the witness Scott to testify in behalf of his Agency, over the objection of the defendant, that the same was irrelevant, immaterial and incompetent, substantially as follows:

85 "I got hold of the information about Conley knowing how to write through my operatives that I had investigating while I was out of town. McWorth told me in person when I returned."

The Court permitted this testimony over the defendant's objections, as above stated, and in doing so committed error. This was prejudicial to the defendant, because the solicitor contended that the failure of Frank to report the fact that Conley could write, was a circumstance against Frank's innocence, and he sought to show by the above testimony that the detectives were forced to get that information from someone other than Frank.

55. Because the Court permitted the witness L. T. Kendrick over the objection of the defendant, made at the time the evidence was offered that the same was irrelevant, immaterial and incompetent, to testify substantially as follows:

"The clock at the pencil factory, when I worked there, needed setting about every 24 hours. You would have to change it from about three to five minutes, I reckon."

The Court permitted this testimony to be heard over the above stated objections of the defendant, and in doing so committed error.

Kendricks had not worked at the factory for months and whether or not the clock was correct at that time was immaterial and tended to confuse the jury in their effort to determine whether or not the clock was accurate upon the date of the tragedy.

56. Because the Court, over the objection of the defendant made at the time the evidence was offered that the same was irrelevant, immaterial, incompetent, illegal and prejudicial to the defendant, permitted the witnesses, Miss Maggie Griffin, Miss Myrtie Cato, Mrs. C. D. Donagan, Mrs. H. R. Johnson, Miss Marie Karst, Miss Nellie Pettis, Miss Mary Davis, Mrs. Mary E. Wallace, Miss Carrie Smith and Miss Estelle Winkle to testify that they were acquainted with the general character of Leo M. Frank prior to April 26, 1913, with reference to lasciviousness, and his relations to women and girls and that it was bad.

The Court admitted this evidence over the objections above stated, and in doing so erred for the reasons herein stated.

In determining general character in cases of murder, lasciviousness or misconduct with women is not one of the traits of character involved. The traits of character involved are peac-ableness, gentleness, kindness, and it is utterly immaterial to prove bad character for lasciviousness in a murder trial.

To permit this evidence was highly prejudicial to the defendant. It attacked his moral character and while such attack would not tend to convict him of murder nor show him a person of such character as would likely commit murder, its introduction prejudiced the jury against him.

86 57. Because the Court permitted the witness Miss Dewie Hewell, over the objection of the defendant that the same was irrelevant, immaterial, incompetent, illegal and dealt with separate and distinct matters and issues from this case, to testify:

"I am now staying in the Station House. Before I came to Atlanta to testify I was in Cincinnati, Ohio, in the Home of the Good Shepherd. I worked at the Pencil Company during February and March, 1913. I quit there in March. I worked on the fourth floor and worked in the metal room, too. I have seen Mr. Frank hold his hand on Mary's shoulder. He would stand pretty close to Mary when he would talk to her, he would lean over in her face."

The Court permitted this testimony over the objection of the defendant, made as is above stated, and in doing so committed error. This was prejudicial to the defendant, because it was introduced to show an effort to be criminally intimate with Mary and inflamed and misled the jury.

58. Because the Court permitted the witness, Miss Cato, over the objection of the defendant that the same was incompetent, illegal and immaterial, to testify substantially as follows:

"I know Miss Rebecca Carson. I have seen her go twice into the private ladies' dressing room with Leo M. Frank."

The Court permitted this testimony over the objection of the de-

fendant made as is aforesaid and in doing so committed error. The Court stated that this evidence was admitted to dispute the witness they had called.

It was wholly immaterial to the issues involved in this case whether Frank did or did not go into a private dressing room with Miss Carson. It did, however, prejudice the jury as indicating Frank's immorality with reference to women.

59. Because the Court erred in permitting the witness Maggie Griffin to testify over the objection of the defendant made when the testimony was offered that the same was immaterial, illegal, and incompetent, to testify substantially as follows:

"I have seen Miss Rebecca Carson go into the ladies' dressing room on the fourth floor with Leo M. Frank. Sometimes it was in the evening and sometimes in the morning during working hours. I saw them come in and saw them come out during working hours."

The Court permitted this testimony to go to the jury over the objection of the defendant made as is aforesaid and in doing so committed error. The Court stated that this evidence was admitted to dispute the witnesses they had called.

It was wholly immaterial to the issues involved in this case whether Frank did or did not go into a private dressing room with Miss Carson, it did, however, prejudice the jury as indicating Frank's immorality with reference to women.

87 60. Because the Court refused to give the following pertinent legal charge in the language requested:

"The jury are instructed that if under the evidence they believe the theory that another person committed this crime is just as reasonable and just as likely to have occurred as the theory that this defendant committed the crime, that then the evidence would not in a legal sense have excluded every other reasonable hypothesis than that of the prisoner's guilt and you should acquit him."

This request was submitted in writing and was handed to the Court before the jury had retired to consider of their verdict and before the Court began his charge to the jury.

This request was a legal and pertinent one, particularly adjusted to the facts of the case and should have been given, and the Court in declining to give it committed error, although the general principle involved might have been given in the original charge.

61. Because the Court refused to give the following pertinent legal charge in the language requested:

"If the jury believe from the evidence that the theory or hypothesis that James Conley may have committed this crime is just as reasonable as the theory that the defendant may have committed this crime, then, under the law, it would be your duty to acquit the defendant."

This request was submitted in writing and was handed to the Court before the jury had retired to consider of their verdict and before the Court began his charge to the jury.

This request was a legal and pertinent one, particularly adjusted to the facts of the case and should have been given, and the Court

in declining to give it committed errer, although the general principle involved might have been given in the original charge.

62. Because the Court refused to give the following pertinent legal charge in the language requested:

"The jury are instructed that in all cases the burden of proof is upon the State. The State only half carries that burden when it establishes a hypothesis of guilt, but also leaves a hypothesis of innocence. If both theories are consistent with the proved facts, the very uncertainty as to which is correct requires that the jury shall give the benefit of the doubt to the defendant. But when the defendant relies upon circumstantial evidence, he is not obliged to remove the doubt. It is sufficient if he create a reasonable doubt. He is not obliged to prove his innocence. He may rely upon the failure of the State to establish his guilt. If the proved facts in the case establish a hypothesis consistent with the defendant's innocence and sufficient to create a reasonable doubt of his guilt, this is sufficient to acquit him and it is not necessary that he should go further in his proof and exclude every possible idea of his guilt. No such burden is upon the defendant."

88 This request was submitted in writing and was handed to the court before the jury had retired to consider of their verdict and before the court began his charge to the jury.

This request was a legal and pertinent one, particularly adjusted to the facts of the case and should have been given, and the Court in declining to give it committed error, although the general principle involved may have been given in the original charge.

63. Because the Court declined to give the following pertinent legal charge in the language requested:

"No presumption can arise against the defendant, because of failure to cross examine any witnesses put up by the State, that the defendant was guilty of any particular acts of wrong-doing. You should not, therefore, consider that this defendant because of such failure to cross examine any state's witnesses, has been guilty of any particular acts of wrong-doing."

The above request was submitted to the court in writing before the jury retired to consider their verdict and before the charge was given to the jury.

The above is a correct statement of the law and applicable to the present issue, and the court erred in declining to give it.

The failure to give it was prejudicial to the defendant, for the reason that quite a number of character witnesses were introduced by the state and not cross-examined by the defendant. The solicitor urged before the jury that this failure to cross-examine was evidence of the fact that a cross-examination would have brought out particular acts of wrong-doing which would have affected the defendant's character.

64. Because the court erred in declining to grant a mistrial on motion of the defendant, made by his counsel, made after the argument of the solicitor and before the charge of the court. The motion made by the defendant for a mistrial is as follows:

"I have a motion to make, Your Honor, for a mistrial in this

case, and I wish to state the facts on which I base it, and I wish the stenographer to take it down, and we propose to prove every fact stated in the motion unless the court will state that he knows the facts and will take cognizance of them without proof.

"First. That counsel requested before this trial began that the court room be cleared of spectators.

"Second. When the court declined to rule out the evidence as to other alleged transactions with women, by Jim Conley, the audience in the court room, who occupied nearly every seat, showed applause by the clapping of hands and stamping of feet and shouting in the presence of the court; the jury was in a room not over twenty feet from the court room—that room back there (indicating), and heard the applause. The court refused to declare a mistrial or to clear the court room on motion of the defendant.

"Third. That on Friday, August 22nd, when the trial was on and the court had just adjourned for the day, and the jury was about 200 feet from the court house proceeding north on Pryor Street, as Mr. Dorsey, the solicitor general, was leaving the
89 court house, a large crowd assembled in front of the court house and, in the hearing of the jury, cheered and shouted 'Hurrah for Dorsey' in the hearing of the jury.

"Fourth. That on Saturday, August 23, 1913, while the trial was still on, and when the court adjourned and Mr. Dorsey emerged from the court room a large crowd, standing on the street, applauded and cheered Mr. Dorsey, shouting 'Hurrah for Dorsey.' The jury at this time was in a café at lunch, about 100 feet away, and a portion of the crowd moved up in front of the café, at which the jury were at lunch, and in the hearing of the jury shouted 'Hurrah for Dorsey.'

"Fifth. On the last day of the trial, a large crowd, including many women, had assembled in the court room before court opened, taking up every seat in the court room. The jury were in their room not over 20 feet from the court room, and as Mr. Dorsey entered the room, the crowd applauded loudly by clapping of hands and stamping of feet, all in the hearing of the jury. The court admonished the people that if the applause was repeated, he would clear the court room.

"Now, we move upon those facts, which tend to coerce and intimidate and unduly influence this jury, that the court here and now declare a mistrial, and we stand ready to prove each and every fact there and we offer to prove them. Now, if your Honor will take cognizance of those facts as stated, then, of course it will dispense with proof. If your Honor does not take cognizance of them, we are ready to prove them by numbers of people who heard them, including myself; I have heard it, all of it, and the conduct has been most disgraceful. The defendant has not been accorded anything like a fair trial and I am disgusted, may it please your honor, with the unfairness of those members of the public who make such an exhibition of themselves when a man is on trial for his life. I am not afraid of them; I hope nobody else is afraid of them; but the natural tendency is to intimidate a jury, to coerce a jury, and I have never seen a trial so hedged in and surrounded with manifestations of public opinion.

I make the motion to declare a mistrial and stand ready to prove these facts. If the court knows them, the court can take cognizance of them."

Upon this motion the Court stated that as to part of the facts he knew and part he did not know. That what occurred on August 25, 1913, the last day of the trial, he did know, as it took place in his presence; that he did hear cheering when Mr. Dorsey went out on the occasion mentioned, but as to what the crowd said, outside of the whooping and holloing, he did not know, and that he did hear the applause in the court room when the court declined to rule out the evidence as to several alleged transactions with women, by Jim Conley.

In support of this motion to declare a mistrial, the following evidence was introduced:

Mr. Deavours testified that he was a deputy sheriff of Fulton County in charge of the jury on Saturday when Mr. Dorsey was applauded in front of the court house as he left that house. When the applauding begun, the jury was in or near the German Cafe, where they went to dinner. When the applause first begun they were about 100 feet from the court house, entering the cafe. That he heard the applause, but did not hear the crowd hollo "Hurrah for Dorsey;" he heard the holloing and cheering and the jury could have heard what he did. That the applause he heard was outside of the cafe, he did not hear the cheering from the inside of the cafe. That he did not remember how many people came up in front of the cafe. No one came in the cafe into the room where the jury was, that is, in the room in the rear.

90 Mr. Arnold testified: I wish to state that on Friday when court adjourned Mr. Dorsey left the court room and as he left the court room I heard loud cheering at the front. On Saturday, when court adjourned, I asked Mr. Dorsey not to go out until the jury had gotten away from where they could hear the noise of the crowd, for fear they should cheer him again as he left the court room. Mr. Dorsey said all right, and remained in the court room for a while. Finally, I thought the crowd had left, and I presume Mr. Dorsey thought the crowd had left, and of course I do not claim that he is responsible for the cheering, but he finally left the court room and went out, and I went out with Mr. Rosser shortly afterwards, behind him. As Mr. Deavours says, it turned out that the jury had not at that time entered the German Cafe, although I didn't see them. I saw people up there but I didn't know who they were, but as Mr. Dorsey left the court room there were loud and excited cheers and cries of "Hurrah for Dorsey." My judgment is that you could have heard the cheers and cries of "Hurrah for Dorsey" without any trouble, all the way from the court house up Alabama street; that is my opinion. They kept cheering him and as my friend went across the street the cries continued until he got clear into the Kiser building. The first cheering was on Friday afternoon, but the second time was on Saturday when I asked Mr. Dorsey not to go out. I asked Mr. Dorsey not to go out until the crowd dispersed. He stayed in; I am not trying to blame Mr. Dorsey for it. I didn't know the

crowd was waiting out there, and I presumed the jury had gotten out of hearing but found they had not. I didn't hear the case mentioned; I heard no allusion to this case but I heard cries of "Hurrah for Dorsey," but on the other occasions—while I love for my friend to meet all the approbation that he may get from the public, I did think that it was an outrage, the crying and shouting; that is what I thought. If the jury were where Mr. Deavours said they were, they could hear; no trouble about hearing it, if they had good ordinary hearing. On Friday I was in the court room when I heard most of the crying; I do not know where the jury was then.

Charles F. Huber testified: I was in charge of the jury when they left the court room Friday afternoon. I do not know how far the jury had gotten before the crowd began cheering in front of the court house. I didn't know myself that they had cheered until the next morning. They didn't know it at all. I had charge of the rear end of the jury. I have good hearing and I heard no cheering.

After the introduction of this testimony, Mr. Arnold for the defense stated that he desired time to examine Mr. Pennington and Mr. Liddell, the other two bailiffs in charge of the jury, who were then absent and asked the court to give him time to make the proof.

After the hearing of this request and the above evidence, the Court ruled: "Well, I am going to charge this jury on this case, and I will give you an opportunity, don't you understand, afterwards, to complete your showing about that, but I will overrule the motion."

During the hearing of this motion for a mistrial and when the witness Charles F. Huber was on the stand and swore that he heard no cheering on the Friday afternoon referred to, and that the jury did not hear it, there was applause among the spectators, on account of the statement that the jury did not hear the cheering. Mr. Arnold called attention to the applause, stating to the Court that the crowd could not be held in even while they were making this investigation.

91 The Court paid no further attention to this applause than to ask, "What is the matter with you over there?"

In failing to grant the mistrial requested, the Court erred. The motion, taken in connection with the admitted and proven facts, movant contends, clearly show that the defendant was not having a fair trial by reason of the great excitement of the crowd. The court room was in an exceedingly small building, on the ground floor, and was crowded during the whole of the trial and defendant contends that this prejudice and animosity of the crowd against him, as shown by the frequent applause, necessarily reached the jury box and prevented him from having a fair trial.

As permitted by the Court, in his order just aforesaid, we attach hereto in support of this motion for new trial the affidavits hereto attached, marked Exhibits J to AA, both inclusive, and said Exhibits are hereby made a part of this motion for new trial.

65. Because the defendant contends he did not have a fair and impartial trial, by an impartial jury, as provided by the Constitution and laws of this State, for the following reasons, to-wit:

(*a*) On August 6, 1913, during the trial, the defendant's counsel

moved to rule out the testimony of the witness Conley tending to show acts of perversion and acts of immorality on the part of the defendant, wholly disconnected with and disassociated from this crime. The Court declined to rule out said testimony and immediately upon the statement of the Court that he would let such testimony remain in evidence before the jury there was instant, pronounced and continuous applause throughout the crowded court room where the trial was being had, by clapping of hands and by striking of feet upon the floor.

While the jury was not then in the same room where the trial was being had, they were in a room about 50 feet from where the judge was sitting and about 20 feet from portions of the crowd applauding, and so close that perhaps the jury could have heard the applauding.

(*b*) And again during the trial, Mr. Arnold, one of the counsel for the defendant, in the presence of the jury, objected to a question asked by the solicitor, and the following colloquy took place:

Mr. ARNOLD: I object to that, your Honor, that is entering the orders on that book merely; that is not the question he is asking now at all.

The COURT: What is the question he is asking now?

(Referring to the solicitor-egeneral.)

Mr. ARNOLD: He is asking how long it took to do all this work connected with it. (Referring to work done by Frank the day of the murder.)

The COURT: Well, he knows what he is asking him.

(Referring to the solicitor-general.)

Upon this suggestion of the Court that the solicitor knew what he was doing, the spectators in the court room applauded by striking their hands together and by the striking of feet upon the
92 floor, creating quite a demonstration. Defendant's counsel complained of the conduct of the spectators in the court room. The Court gave no relief except directing the sheriff to find out who was making the noise.

(*c*) During the examination by Mr. Arnold, counsel for the defendant, of V. H. Kreigshaber, a witness for the defendant, there was laughter in the audience sufficiently generally distributed throughout the audience and loud enough to interfere with the examination. Mr. Arnold called the Court's attention to the interruption for the purpose of obtaining some action from the Court thereon.

The Court stated that if there was other disorder, no one would be permitted in the court room the following day and requested the sheriff to maintain order.

(*d*) That during the trial, on Friday, August 22d, 1913, when the Court had just adjourned for the day, and the jury was about 300 feet away from the court house, proceeding north on Pryor Street, as Mr. Dorsey, the solicitor-general, was leaving the court room, a large crowd assembled in front of the court house, and in the hearing of the jury cheered and shouted "Hurrah for Dorsey."

(*e*) That during the trial, on Saturday, August 23, 1913, when court adjourned and Mr. Dorsey emerged from the court room, a large crowd, standing on the street, applauded and cheered him,

shouting "Hurrah for Dorsey." At that time the jury was between the court house and what is known as the German Cafe and near enough to the crowd to hear the cheering and shouting. A portion of the crowd moved up in front of the cafe at which the jury were at lunch, and in the hearing of the jury shouted "Hurrah for Dorsey."

(*f*) On the last day of the trial, Monday, August 25th, 1913, a large crowd, including many women, had assembled in the court room before court opened, taking up every seat in the court room. The jury were in their room about 20 feet from the court room, and as Mr. Dorsey entered the room the crowd applauded loudly by clapping of hands and stamping of feet, which the jury perhaps could have heard. The court did nothing but admonish the people that if the applause was repeated, he would clear the court room.

(*g*) On Monday the last day of the trial after the argument of counsel had been had and the charge of the court had been given and the case was in the hands of the jury, when Solicitor Dorsey left the court room a very large crowd awaited him in front of the court house and shouted and applauded by clapping their hands and shouting, "Hurrah for Dorsey."

(*h*) When it was announced that the jury had agreed upon a verdict the Judge of the Superior Court, his Honor, L. S. Roan, went to the court house which was a comparatively shall room on the first floor, at the junction of Hunter and Pryor Streets, and found the court room packed with spectators. Fearful of misconduct
93 among the spectators in the court room, the Court of his own motion cleared the room before the jury announced their verdict. When the verdict of guilty was rendered, the fact of the rendition of such verdict was signaled to the crowd on the outside, which consisted of a large concourse and crowd of people standing upon Hunter and Pryor Streets. Immediately upon receiving such signal and while the court was engaged in polling the jury and before the polling ended, great shouts arose from the people on the outside, expressing gratification. Great applauding, shouting and halloing was heard on the streets and so great became the noise on the streets that the Court had difficulty in hearing the responses of the jurors as he polled them. These incidents showed, as the defendant contends, that the defendant did not have a fair and impartial jury trial and that the demonstration of the crowds attending court was such as to inevitably affect the jury.

The exhibits hereto attached marked J to AA inclusive are made a part of this ground.

66. Because that fair and impartial trial guaranteed him by the Constitution of this State was not accorded the defendant for the following reasons:

The court room wherein this trial was had was situated at the corner of Hunter and Pryor streets. There are a number of windows on the Pryor Street side looking out upon the street and furnishing easy access to any noises that would occur upon the street. The court room itself is situated on Hunter Street, 15 or 20 feet from Pryor Street. There is an open alleyway running from Pryor St.,

along by the side of the court house, and there are windows from the court room looking on to this alley and any noise in the alley can easily be heard in the court room. When Solicitor Dorsey left the court room on the last day of the trial, after the case had been submitted to the jury, a large and boisterous crowd of several hundred people was standing in the street in front of the court house and as he came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into the Kiser building wherein was his office. This crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of such time a large crowd was gathered at the junction of Pryor and Hunter streets. When it was announced that the jury had reached a verdict, his Honor, Judge L. S. Roan, went to the court room and found it crowded with spectators to such an extent as to interfere with the court's orderly procedure, and fearing misconduct in the court room, his Honor cleared it of spectators. The jury was then brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted and hurrahed at the outset of the poll of the jury, and before more than one juror had been polled to such an extent that the
94 Court had some difficulty in proceeding with the poll of the jury, which was then in progress, and not finished. Indeed, so great was the noise and confusion without that the Court heard the responses of the jurors during the polling with some difficulty. The Court was about 10 feet from the jury. In the court room was the jury, lawyers, newspaper men, and officers of the court, and among them there was no disorder.

The polling of the jury is an important part of the trial. It is inconceivable that any juror, even if the verdict was not his own, to announce that it was not, in the midst of the turmoil and strife without.

The exhibits J to AA inclusive are hereby made a part of this ground, and the Court will err if it does not grant a new trial on this ground.

67. Because the Court erred in failing to charge the jury that if a witness knowingly and wilfully swore falsely in a material matter, his testimony shall be rejected entirely, unless it be corroborated by facts and circumstances of the case or other creditable evidence. The Court ought to have given this charge, although no written request was formally made therefor, for the reason that the witness Jim Conley, who testified as to aiding Frank in the disposal of the body, was attacked by the defendant as utterly unworthy of belief, and he admitted upon the stand that he knew that he was lying in the affidavits made by him, with reference to the crime and before the trial.

Especially ought this charge to have been given, because the Court, in his charge to the jury, left the question of the credibility

of witnesses to the jury, without any rule of law to govern them in determining their credibility.

68. Because the Court permitted to be read to the jury, over the objection of the defendant made at the time the testimony was offered, that same was immaterial, irrelevant, incompetent, and not binding upon Frank a part of an affidavit made by the witness Minola McKnight, as follows:

"They pay me $3.50 a week, but last week she paid me $4, and one week she paid me $6.50. Up to the time of this murder I was getting $3.50 per week and the week right after the murder I don't remember how much she paid me, and the next week they paid me $3.50 and the next week they paid me $6.50, and the next week they paid me $4, and the next week they paid me $4. One week, I don't remember which one, Mrs. Selig gave me $5, but it wasn't for my work, and they didn't tell me what it was for, she just said 'Here is $5 Minola.' "

The Court permitted this part of the affidavit to be read to the jury over the objections above stated, and in doing so erred for the reasons stated.

This was prejudicial to the defendant, inasmuch as it permitted the affidavit of the witness Minola McKnight to be read to the jury as to transactions between herself and the Seligs, with which Frank had no connection, but which the solicitor-general insisted showed that Frank's relatives were seeking to influence this darkey by paying her money in addition to that which she earned. The
95 Seligs and Minola McKnight had been asked on cross examination if these statements in this affidavit were true, and had denied that these statements were true.

69. Because the Court erred in permitting Mr. Hooper, for the State, to argue to the jury that the failure of the defense to cross-examine the female witnesses who, in behalf of the State, had testified to the bad character of Frank for lasciviousness, was strong evidence of the fact that, if the defendant had cross-examined them, they would have testified to individual incidents of immorality on the part of Frank; that the defendant's knowledge that they would bring out such incidents was the reason for not cross-examining the witnesses; and that the jury could, therefore, reasonably know that Frank had been guilty of specific incidents of immorality other than those brought out in the record.

The defendant strenuously objected to this line of argument on the part of Mr. Hooper and urged the Court to state to the jury that the failure to cross-examine any of said witnesses justified no inference on the part of the jury that the cross-examination, if had, would have brought out anything hurtful to the general character of Frank.

This the Court declined to do and permitted the argument; and, in so doing, committed error, for which a new trial should be granted.

70. Because the solicitor-general, in his argument to the jury, stated, as follows: "The conduct of counsel in this case, as I stated, in refusing to cross-examine these twenty young ladies, refutes

effectively and absolutely that he had a good character. As I said, if this man had had a good character, no power on earth could have kept him and his counsel from asking where those girls got their information, and why it was they said that this defendant was a man of bad character. Now, that is a common sense proposition; you'd know it whether it was in a book or not. I have already shown you that under the law, they had the right to go into that character, and you saw that on cross-examination they dared not do it. * * * Whenever anybody has evidence in their possession, and they fail to produce it, the strongest presumption arises that it would be hurtful if they had; and their failure to introduce evidence is a circumstance against them. You don't need any law book to make you know that; that is true, because your common sense tells you that whenever a man can bring the evidence, and you know that he has got it and don't do it, the strongest presumption arises against him. And you know, as twelve honest men seeking to get at the truth, that the reason these able counsel did not ask those hair-brained fanatics, as Mr. Arnold called them before they had ever gone on the stand—girls whose appearance is as good as any they brought, girls that you know by their manner on the stand are speaking the truth, girls who were unimpeached and unimpeachable, the reason they didn't ask them. Why? They dared not do it. You know it; if it had never been put in the law books, you would know it."

96 This address of the solicitor was made in the hearing, and in the presence of the jury, without any protest or comment on the part of the Court.

The defendant made no objection to this argument at the time same was being had, for the reason that similar argument made by Mr. Hooper had been objected to by counsel, and their objection overruled. The objection made to the argument of Mr. Hooper was not here repeated, for the reason that the Court had stated, in the outset of the case, that objection once noted in the record need not in similar instances be repeated, but that the Court would assume that similar objections had been made and overruled.

This argument of the Solicitor was not only illegal, but prejudicial to the defendant, in that he, in substance, urged upon the jury that a cross-examination of female witnesses for the State, who testified to Frank's bad character for lasciviousness, would, upon cross-examination, have testified as to specific acts of immorality against him.

71. Because the Court permitted the solicitor, over the objection of defendant's counsel, to argue before the jury that the wife of the defendant did not speedily visit him when he was first taken under arrest, and that her failure to do so showed a consciousness on her part that her husband was not innocent.

In addressing this question to the jury, the solicitor said: "Do you tell me that there lives a true wife, conscious of her husband's innocence, that would not have gone through snap-shotters, reporters, and everything else to have seen him? Frank said that his wife never went there because she was afraid that the snap-shotters would

get her picture, because she didn't want to go through the line of snap-shotters. I tell you, gentlemen of the jury, that there never lived a woman conscious of the rectitude and innocence of her husband who would not have gone through snap-shotters, reporters, and the advice of any rabbi under the sun—and you know it."

Defendant's counsel objected to this line of argument, when the same was being made, upon the ground that the conduct of his wife could in no sense be used as evidence of Frank's guilt, and that the solicitor had no right to argue as he did.

The Court declined to stop the argument, but permitted it to continue. The solicitor impassionately argued it to the jury—that Mrs. Frank's conduct in not visiting her husband was strong evidence of his guilt.

This argument was highly prejudicial to the defendant, and the Court erred in permitting it to be made and in not reprimanding the solicitor-general for the making of such an argument.

72. Because the Court permitted the solicitor-general, in arguing the relative value of the expert testimony delivered by the physicians called for the State and defense, to intimate that the defense, 97 in calling its physicians, had been influenced by the fact that certain physicians called were the family physicians of some of the jurors. In discussing it, the solicitor said: "It would not surprise me if these able, astute gentlemen vigilent as they have shown themselves to be, did not go out and get some doctors who have been the family physicians, who are well known to some of the members of this jury, for the effect it might have upon you; and I am going to show that there must have been something besides the training of these men, and I am going to trace them with our doctors. I can't see any other reason in God's world for getting out and getting these practitioners, who have never had any special training on stomach analysis, and who have not had any training on the analysis of tissues—like a pathologist has had, except upon that theory."

Objection was made to this argument of the solicitor, at the time it was being made, upon the ground that there was no evidence to support any such argument; that it was illegal, prejudicial, and highly improper.

73. Because the juror, A. H. Henslee, was not a fair and impartial juror, but was prejudiced against the defendant when he was selected as a juror, had previously thereto formed and expressed a decided opinion as to the guilt of the defendant; and, when selected as a juror, was biased against the prisoner in favor of the State. Affidavits are hereto attached and marked Exhibits A, B, C, D, E, I, BB, CC, DD, EE and JJ, KK, LL, MM, NN, which are hereby made a part of this motion for new trial. Affidavits sustaining the character of the witnesses against said Henslee are hereto attached, marked Exhibits FF, GG, HH, and II.

The conduct of this juror, as shown by the affidavits and other evidence, the condition, conduct, and state of mind of this juror is conclusive that the defendant did not have a fair and impartial jury trial, as provided by the laws and the Constitution of this

State; and a new trial should be granted. Upon failure to do so, the Court will commit error.

74. Because the juror, Johenning, was not a fair and impartial juror, in that he had a fixed opinion that the defendant was guilty prior to, and at the time he was taken on the jury and was not a fair and impartial and unbiased juror. Affidavits showing that he was not a fair and impartial juror are hereto attached and marked Exhibits E, F, G, K, and I, and made a part of this motion for new trial.

The opinion, conduct, and state of mind of this juror prior to, and at the time of, his selection as a juror shows that the defendant did not have a fair and impartial trial, as provided by the laws and the Constitution of this State; and, because of the unfairness and impartiality of this juror, a new trial should be granted, and the Court will commit error in not granting it.

98 75. Because this defendant, as he contends, did not have a fair and impartial jury trial, guaranteed to him under the laws of this State, for the following reasons, to-wit:

Public sentiment seemed to the Court to be greatly against him. The court room was a small room, and during the argument of the case so far as the Court could see about every seat in the court room was taken, in and without the bar, and the aisles at each end of the court room were packed with spectators. The jury, in going from the jury seats to the jury room, during the session of the court, and in going to and from the court room morning, evening and noon, were dependent upon passage-ways made for them by the officers of court. The bar of the court room itself was crowded, leaving only a small space to be occupied by counsel in their argument to the jury. The jury-box, when occupied by the jury, was inclosed by the crowd sitting and standing in such close proximity thereto that the whispers of the crowd could be heard during a part of the trial. When the Court's attention was called to this he ordered the sheriff to move the crowd back, and this was done.

During the argument of the solicitor, Mr. Arnold of counsel for the defense, made an objection to the argument of the solicitor, and the crowd laughed at him, and Mr. Arnold appealed to the Court.

On Saturday, prior to the rendition of the verdict on Monday, the Court was considering whether or not he should go on with the trial during Saturday evening, or to what hour he should extend it in the evening, the excitement in and without the court room was so apparent as to cause apprehension in the mind of the Court as to whether he could safely continue the trial during Saturday afternoon; and, in making up his mind about the wisdom of thus continuing the trial, his Honor conferred with, while on the stand, and in the presence of the jury, the chief of police of Atlanta and the colonel of the Fifth Georgia regiment stationed in Atlanta conferred with his Honor. Not only so, but the public press, apprehending trouble if the case continued on Saturday, united in a request to the Court that he not continue the Court on Saturday evening. The Court, being thus advised, felt it unwise to extend the case on Saturday evening, and continued it until Monday morning. It was evi-

dent on Monday morning that the public excitement had not subsided, and that it was as intense as it was on Saturday previous. The same excited crowds were present, and the court house was in the same crowded condition. When the solicitor entered the court room he was met with applause by the large crowd—ladies and gentlemen present by stamping their feet and clapping their hands, while the jury was in their room about twenty feet away.

While Mr. Arnold, of the defense, was making a motion for a mistrial, and while taking testimony to support it before the Court, the crowd applauded when the witness testified that he did not think the jury heard the applause of the crowd on Friday of the trial. The jury was not in the court room, but were in the jury room about 20 feet away.

99 When the jury was finally charged by the Court, and the case submitted to them, and when Mr. Dorsey left the court room, a large crowd on the outside of the court house, and in the streets, cheered by yelling, and clapping hands, and yelling "Hurrah for Dorsey."

When it was announced that the jury had agreed upon a verdict, crowds had thronged the court room to such an extent that the Court felt bound to clear the court room before receiving the verdict. This the Court did. But, when the verdict of the jury was rendered, a large crowd had thronged the outside of the court house; someone signaled to the outside what the verdict was, and the crowd on the outside raised a mighty shout of approval. So great was the shouting and applause on the outside that the Court had some difficulty in hearing the response of the jurors as he called them.

The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the Court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered.

When Mr. Dorsey left the court room, he was met at the court house door by a multitude, was hurrahed, cheered, taken upon the shoulders of a part of the crowd and carried partly to the building opposite, wherein he had his office.

This defendant contends that the above recital shows that he did not have a fair and impartial jury trial; that a new trial ought to be granted; and that the Court, failing to grant such new trial, will commit error.

In support of this ground of the motion movant refers to the affidavits hereto attached marked Exhibits J to AA, inclusive, and hereby made a part of this motion for new trial.

76. Because the Court erred in not leaving it to the jury to say whether or not, under the facts, the witness Conley was an accomplice.

The State insisted that Conley was watching for Frank to enable him to have connection with some girl, naturally or unnaturally; and Frank seeking to get her consent and failing killed her to insure her silence, and then employed Conley who had previously been watching for him to enable him to conceal her body.

If Conley was aiding and abetting Frank in his transactions with Mary Phagan, and if, as a natural and probable result of such transaction, Mary Phagan met her death, then Conley would be an accomplice of Frank, although he had no personal part in her killing. The Court, under proper instructions, ought to have left it to the jury to say whether Conley was or not an accomplice of Frank; and, in failing to do, and because he failed to do so the Court committed error.

77. The Court erred in not charging the jury that if, under instructions given them, they found that Conley was an ac-
100 complice of Frank, they could not convice Frank under the testimony of Conley alone; but that, to do so, there must be a witness other than Conley or circumstances corroborating the evidence of Conley.

78. Because the Court permitted the witness, Irene Jackson, at the instance of the solicitor-general, and over the objection of the defendant, made at the time the testimony was offered, that the same was irrelevant, immaterial, illegal, and prejudicial to the defendant, to testify substantially as follows:

"I remember having a conversation with Mr. Starnes about a dressing room incident. I told him that Mr. Frank came to the door of the dressing room while Emily Mayfield was dressing. He looked and turned around and walked out—just pushed the door open and looked in. I don't know whether he smiled or not. I never noticed to see whether he smiled or not; he just kind of looked at us and turned and walked out. I didn't time him as to how long he stayed; he just came and looked and turned and walked out. At the time, Miss Emily Mayfield had off her top dress and was holding her old dress in her hand to put it on. I did not report that to the forelady, but Miss Ermilie did. I have heard remarks other than those of Miss Mayfield about Frank going into the dressing room, but I don't remember who said them. I just remember I heard something about it, two or three different times, but I don't remember anything about it, just a few times. I heard the girls talking about Mr. Frank going into the dressing room on two or three different occasions. It was the middle of the week after we started to work there; I don't remember the time. Mr. Frank also entered the dressing room when my sister was in there lying down; she just had her feet up on the table; she had them on a stool, I believe. She was dressed. I don't remember how her dress was; I didn't look. I paid no attention to him, only he just walked in and turned and walked out; looked at the girls that were sitting in the window and walked out. There was something said about this, but I don't remember. I have heard something about him going in the room and staring at them, but I don't remember exactly. Mr. Frank walked in the dressing room on Miss Mamie Kitchens. She and I were in there. I have heard this spoken of, but I don't remember. I have heard them speak of other times, when I wasn't there. Mr. Frank said nothing either time when I was there. The door was pushed to, but there was no way to fasten the door. He pushed the door open and stood in the door. The dressing room had a mirror in it.

It was all one room, except there were a few lockers for the foreladies, and there was a place where the girls changed their street dresses and got into their working dresses, and vice versa. There was no way for Mr. Frank to tell before he opened the door what the condition of the girls was in there. I do not know whether he knew they were in there or not. That was the usual time for the girls to go in the dressing room, undress and get ready to go to work, changing their street clothes and putting on their working clothes. We had all registered on before we went up there in the dressing room. Mr. Frank knew the girls had stopped there to register. The day he looked in the dressing room at Miss Mayfield, he smiled, or made some kind of a face that looked like a smile—smiling at Miss Mayfield, he didn't speak or didn't say a word."

This evidence was objected to for the reasons above stated, and for the further reason that statements tending to show the conduct of Mr. Frank with girls, in going into the dressing rooms
101 with girls, was intended to create prejudice in the minds of the jurors against the defendant; and, not to illustrate the question of whether he was or was not the murderer of Mary Phagan. The Court overruled these objections and let the testimony go to the jury; and in doing so movant contends, erred for the reasons above stated.

79. Because the Court permitted the witness, Harlee Branch, at the instance of the solicitor-general, to testify to incidents at the pencil factory, wherein Conley, after having made the third affidavit, purported to re-enact the occurrence of the murder between himself and Frank, wherein the body of Mary Phagan was taken from the office floor to the cellar of the factory, the testimony permitted by the Court being substantially as follows:

"I will have to give you the time of Conley's arrival at the factory, approximately. I was up there at twelve o'clock, and I was a few minutes late. Conley had not arrived there then. We waited until they brought him there, which was probably ten or fifteen minutes later. The officers brought Conley into the main entrance of the factory here and to the stair-case—I don't know where the stair-case is here—yes, here it is (indicating on diagram) and they carried him up here and told him what he was there for, and questioned him, and made him understand that he was to re-enact the pantomime. After a few minutes' conversation, and a very brief conversation, Conley led the officers back here and turned off to his left to a place back here; I guess this is it (indicating on diagram), right where this is near some toilets, and he was telling his story as he went through there, and he said when he got up there, he went back and found this body in that place. He was talking constantly—all the time; I don't know how he made out a part of his story. Well, when he got back— After reaching this point at the rear left side of the factory, describing the position of the body, as he stated it, he stated the head was lying towards the north and the feet towards the south, as indicated, and there was a cord around the neck. He didn't state how long it took for the various movements. I didn't time it; I know the time I arrived there and the time I left the fac-

tory. Conley said when he found the body he came up to Mr. Frank—called to him some point along here I should judge (indicating on the diagram). I don't understand this diagram exactly. And he told him the girl was dead, and I don't know just exactly what Frank said. I will try to eliminate as much of that conversation as I can. Anyhow, he said he came on up to where Mr. Frank was, and that he was instructed to go to the cotton room, which he showed us; I don't know, it must be on the same side of the building about here, I judge (indicating) and he went in there. He showed us the cotton room, and he said he went back, and he did go back, led us back, and told about taking up the body, how he brought it up on his shoulder, and then, in front of a little kind of impression on the wall, he said he dropped it, and he indicated the place, and then he come up and told Mr. Frank about it—that he would have to come and help him or something like that—and that Mr. Frank came back and took the feet, I believe he said, and he took the head, and they brought the body up to the elevator and put it on the elevator. He was enacting this all the time and talking all the time. He described how the body was put on the elevator, and he said Mr. Frank run the elevator down, and he went down on the elevator. On this trip he went down in the elevator to the basement, and he said

Mr. Frank helped to take the body out, and they dropped it
102 there, and Mr. Frank told him to take it up and carry it back,

and he put the body on his shoulder and carried it back to this sawdust which is away back here, and that he came on back, and he said there was some things in here which he threw on this trash pile, and Mr. Frank, he said, was up in the cubby hole, he said—somewhere back there—and later he led us up there—and that Mr. Frank told him to run the elevator up; so Conley and the officers and the rest of us who were with him came up in the elevator; and when they got to the first floor, just before getting to the first floor, he said this was where Mr. Frank got on the elevator. Mr. Frank was waiting there for him. Then they brought the elevator on up to the second floor, and he had them to stop the elevator, just, I suppose, a foot or a little more below the landing; and he said Mr. Frank jumped off when the elevator was about that point, and after getting up, he said Mr. Frank went around the elevator to a sink that he showed us back of the elevator, to wash his hands; and he waited out in front and he said he shut off the power while Mr. Frank was gone around there; and when Mr. Frank came back, they went in the office, and he led us on in the office through—there is an outer office there, and he came in this way and come through in this office back here, this inner office, and he indicated Mr. Frank's desk and a desk right behind it:—I presume this is the two desks (indicating); that Mr. Frank sat down in the chair at that desk, and he told him to sit at the other desk, and Mr. Frank told him to write some notes; and he was asked by some of the officers to write what Mr. Frank told him to write, and he sat down there and wrote one note, and I believe—I know the note he wrote, and I don't know whether he wrote one or two, and that Mr. Frank handed him some money and that later he took it back, and I don't remember whether he gave

him the cigarettes and money before or after this, I don't recall. Anyway, when he was in here, after he had written the notes for the officers, I found it was time for me to get in the office with my copy. He hadn't finished; he was still sitting there; and I telephoned in to the office for relief—some one to relieve me—and I went to the office and I left him there in the office, and I went in. I judge it was about a quarter past twelve when Conley got there. I must have gotten there five minutes before that time. I left about one o'clock. They rushed Conley right up the steps and, probably two or three minutes after he got up there, he began this enactment, and he went very rapidly—we sort of trotted to keep behind him. Questions were constantly asked him by four or five of the officers. I have cut out a good deal of Conley's talking; just how much, I have no way of indicating. He was talking constantly, except when interrupted by questions. I didn't time it when I got there. When got to the office from the police station it was ten minutes after twelve and I walked down just about a block and a half. Conley got there, I should say, about five minutes after I did. I left a little after one, probably five or ten minutes. It would be a difficult thing for me to estimate how much time it took Conley to enact what he did, leaving out the conversation he had with different men. While he was acting, he was acting very rapidly; he kept us on the trot. There is no way for me to give you my opinion as to how long it took Conley to go through that demonstration; there was no way to disassociate the time and find out the difference between the two—between the time he was acting and talking. I didn't attempt to do that."

The defendant objected to this testimony, because:

(*a*) This so-called experiment made with Conley was solely an endeavor on their part to justify his story.

103 (*b*) The sayings and actings of Conley, as aforesaid, not under oath, had and made without cross-examination, and reported by the witness to the Court, the net result of which is a repetition of Conley's statement, without the sanction of an oath.

(*c*) That Conley went to the factory immediately after making his last affidavit; that that last affidavit is not the way he tells the story on the stand; that he tells it wholly differently on the stand; at least differently in many particulars; that it can not help the jury for Conley to go to illustrate that affidavit when he says now on the stand that much of it was a lie, and that it did not happen that way at all; that this evidence was of another transaction, not binding upon this defendant.

The Court overruled the objection and admitted the testimony to the jury; and, in doing so, committed error, for the reasons above stated.

80. Because the Court, over objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Miss Maggie Griffin, to make the following answers:

Q. Are you acquainted with the general character of Leo M. Frank for lasciviousness; that is his relations with women?

A. Yes, sir.

The Court admitted the above question and answer, over the objection of the defendant as above stated, and thereby erred, for the reasons stated.

81. Because the Court, over objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Miss Myrtie Cato, to make the following answers:

Q. Miss Cato, I want to ask you one other question, also. Are you acquainted with the general character of Leo M. Frank for lasciviousness; that is, his relations towards women?

A. Yes, sir.

Q. Is it good or bad?

A. Bad.

The Court admitted the above questions and answers, over objection of the defendant as above stated, and thereby erred, for the reasons stated.

82. Because the Court, over objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Mrs. H. R. Johnson, to make the following answers:

Q. Now, are you acquainted with his (Frank's) general character for lasciviousness; that is, his general character towards women generally?

A. No, sir, not very much.

104 Q. Not very much? Well, answer the question: yes or no; are you acquainted?

A. All right, she said, not very much.

The Court admitted the above questions and answers, over the objection of defendant as above stated, and thereby erred, for the reasons stated.

83. Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Miss Marie Carst, to make the following answers:

Q. Bad; now, Miss Carst, I will ask you if you are acquainted with his (Frank's) general character for lasciviousness; that is, his attitude towards girls and women?

A. Yes, sir.

Q. Is that character good or bad?

A. Bad.

The Court admitted the above questions and answers, over the objection of the defendant as above stated, and thereby erred, for the reasons stated.

84. Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted

the solicitor-general to ask the following questions, and the witness, Miss Nellie Pettis, to make the following answers:

Q. Are you acquainted with his (Frank's) general character for lasciviousness; that is, with women prior to that time?

A. Yes, sir.

Q. Is it good or bad?

A. Bad.

The Court admitted the above questions and answers, over objection of the defendant as above stated, and thereby erred, for the reasons stated.

85. Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Miss May Davis, to make the following answers:

Q. I want to ask you another question. Are you acquainted with the general character of Leo M. Frank, prior to April 26, 1913, as to lasciviousness; that is, his relations with girls and women?

A. Yes.

Q. Is that good or bad?

A. Bad.

The Court admitted the above questions and answers, over objection of the defendant as above stated, and thereby erred, for the reasons stated.

86. Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was im-
105 material, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Mrs. Mary E. Wallace, to make the following answers:

Q. I will ask you now if you are acquainted with his general character for lasciviousness; that is, as to his (Frank's) attitude towards girls and women?

A. Yes, sir.

Q. Is that good or bad?

A. Bad.

The Court admitted the above questions and answers, over the objection of the defendant as above stated, and thereby erred, for the reasons stated.

87. Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor-general to ask the following questions, and the witness, Miss Estelle Winkle, to make the following answers:

Q. Are you acquainted with his (Frank's) general character for lasciviousness; that is, his relations with girls and women?

A. Yes, sir.

Q. Is that good or bad?

A. Bad.

The Court admitted the above questions and answers, over ob-

jection of defendant, made at the time the evidence was offered, and thereby erred, for the reasons stated.

88. Because the Court erred, over the objection of the defendant that the same was irrelevant and immaterial and prejudicial to defendant, in permitting the witness, Louis Ingram, to testify as follows:

"I am a conductor for the Georgia Railway & Power Co. I come to town ahead of them cars coming in on English Avenue going to Cooper Street, known as the English Avenue car. I have seen them come in and been on it when it come in, the English Avenue car due at the junction of Marietta and Broad Streets according to schedule at 12:07. I have seen the car due at Marietta and Broad streets according to schedule at 12:07, the English Avenue car, several times come in ahead of the car I was coming in on, as much ahead as four minutes. I saw a car that came in this morning that was due in town at 8:30 and it got in at 8:24. I know the Motorman Matthews. I have seen his car ahead of time. I could not say how often."

The Court permitted this testimony over the objection before stated, and in doing so erred for the reasons stated. This was prejudicial to the defendant because it tended to show that at times other than on the day of the murder, the English Avenue car, which on that day was run by the witness, Motorman Matthews, had reached Marietta and Broad Streets four minutes ahead of time. It became material to determine what time this English Avenue car reached Broad Street on the day of the murder. The
Motorman Matthews and the conductor, swore that on that
106 day the English Avenue car reached Broad Street at 12:07.
The Court permitted this and other like testimony to be introduced as tending to discredit their statements that the car was on schedule time that day. In doing this the Court erred, for the fact that the English Avenue car was ahead of time as much as four minutes on other days did not indicate that it was ahead of time on the day of the murder.

89. Because the Court erred, over the objection of the defendant that the same was irrelevant and immaterial and prejudicial to defendant, in permitting the witness, W. D. Owens, to testify as follows:

"I run on what is known as Route Eight, White City to Howell Station, for the Georgia Railway & Power Co. We were due in town at 12:05. My schedule is ahead of the Cooper Street and English Avenue schedule two minutes. I have known the English Avenue and Cooper Street car to get to the junction of Marietta and Broad Streets ahead of my car. The English Avenue car is due there at 12:07; my schedule at 12:05. I have known the English Avenue car to get there as much as two minutes ahead of us. That would make the English Avenue car four minutes ahead of time. I have known this to occur after April 26th. I don't know whether it occurred prior to that time."

The Court permitted this testimony over the objection before stated, and in doing so errod for the reasons stated. This was preju-

dicial to the defendant because it tended to show that at times other than on the day of the murder, the English Avenue car, which on that day was run by the witness, Motorman Matthews, had reached Marietta and Broad Streets four minutes ahead of time. It became material to determine what time this English Avenue car reached Broad Street on the day of the murder. The Motorman Matthews and the conductor, swore that on that day the English Avenue car reached Broad Street at 12:07. The Court permitted this and other like testimony to be introduced as tending to discredit their statements that the car was on schedule time that day. In doing this the Court erred, for the fact that the English Avenue car was ahead of time as much as four minutes on other days did not indicate that it was ahead of time on the day of the murder.

90. Because of the following colloquy which occurred during the trial and while the witness, John Ashley Jones, was on the stand, during the cross-examination of Jones by the solicitor:

Q. You never heard anybody down there say anything about Mr. Frank's practices and relations with the girls?

A. Not in the Pencil Factory.

Q. Not at all? You never did talk to any of these young girls, did you?

A. No, I don't happen to know any of them.

Q. Or any of the men?

A. No.

Q. You don't know what kind of practices Mr. Frank may have carried on down there in the Pencil Factory?

A. No.

107 Q. You don't know, you never heard anybody say that Mr. Frank would take girls in his lap in his office here?

A. No.

(Here objection was made by Mr. Arnold.)

The COURT: On cross examination he can ask him if he has heard of certain things.

Mr. ARNOLD: Up to April 26th?

The COURT: Yes, sir.

Mr. DORSEY: I am not four-flushing or any such thing; I am going to bring the witnesses here.

Q. You never heard of Frank going out there to Druid Hills and being caught did you, before April 26th?

A. No, but our reporter, it was his business to find out, and if he had found it out, he certainly would not have issued such a policy.

Q. Now, about twelve months ago, you never heard of Frank kissing girls and playing with their nipples on their breast around there?

A. No, I never heard such a thing.

Q. You never heard of that at all?

A. I never heard that. I had been in Mr. Frank's——

Q. You never talked to Tom Blackstock, then, did you?

A. I haven't the pleasure of Mr. Blackstock's acquaintance.
Q. Did you ever know Mrs. L. D. Coursey?
A. I can't say that I ever heard of her.
Q. Miss Myrtie Cato, you never heard of her, and that he would go into the——
A. Mr. Dorsey, I have been down there.

By the COURT: He wants to know if you ever heard of that before.

Q. He made no apology and no explanation, but just walked right on in there when they were lying on the couch?
A. I never heard that.
Q. Did you ever hear of his putting his arms around Myrtie Cato in the office?
A. No, sir.
Q. Did you ever hear about the time he went in on little Gertie Jackson that was sick, lying in the dressing room with her dress up, and stood up there and looked at her, and hear any talk of the girls there about his attitude?
A. No, sir.
Q. Did you ever hear about his frequently going into the dressing room with Vernie McDaniel?
A. No, sir.
Q. Did you ever hear of the time it was said that Miss Pearl Darlson—about five years ago, when he held out the money in one hand and put his hand on the girl, that she threw the monkey wrench at him? You never heard of that time?
A. No, sir.
Q. Did you ever talk to Mrs. Martin Donegan?
A. No, sir, not that I know of.
Q. Did you ever hear them say that he paid special attention to the girls, and winked and smiled at them, and had nude pictures hung up in his office, and walked around and slapped the girls on the seat?
A. No, sir.
Q. Miss Wingate, 34 Mills Street, did you ever talk to her about Frank?
A. No, sir, I don't know her.
108 Q. Did you ever hear C. D. Donegan talk about Frank?
A. No, sir.
Q. You never heard any of these factory people talk about him?
A. No, sir.

The Court erred in permitting the solicitor, although the witness denied hearing all of the remarks referred to, to say in the presence of the jury that he was not four-flushing, but that he was going to bring the witnesses there, thereby improperly saying to the jury that he had such witnesses and meant to bring them in.

The Court erred in not withdrawing this whole subject from the jury and in not rebuking the solicitor-general for injecting the questions in the case and asserting that he had witnesses to prove the things asked about.

These suggestions and intimations of the solicitor-general were exceedingly prejudicial to the defendant, and for making them he ought to have been severely rebuked by the Court, and failure of the Court to do so was cause for a new trial.

91. Because the Court erred in charging the jury as follows:

"Is Leo M. Frank guilty? Are you satisfied on that beyond a reasonable doubt from the evidence in this case? Or is his plea of not guilty the truth?"

The Court erred in putting the proposition of the defendant's guilt or innocence to the jury in this manner, because the effect of the same was to put the burden upon the defendant of establishing his plea of not guilty, and the further effect was to impress upon the jury that unless they believed that the defendant's plea of not guilty was the truth that they could not acquit. The tendency of this charge was to impress upon the jury that they were to consider only upon the one side as to whether they believed Leo M. Frank guilty or upon the other side they were to consider only the question of whether they believed his plea of not guilty, and there was no middle ground in the case. And movant says that the error in this charge is that it leaves entirely out of view the consideration of the third proposition which the jury had the right to consider, and that is as to whether, even though they did not believe his plea of not guilty the truth, still if they had a reasonable doubt in their minds of his guilt they should acquit him.

92. Movant further says that a new trial should be granted because of the following:

Mr. Dorsey, the solicitor-general, in the concluding argument, made the following statement:

"Now, gentlemen (addressing the jury) Mr. Arnold spoke to you about the Durant case. That case is a celebrated case. It was said that that case was the greatest crime of the century. I don't know where Mr. Arnold got his authority for the statement that he made with reference to that case. I would *you* like to know it."

Whereupon the following colloquy occurred:

109 Mr. ARNOLD: I got it out of the public prints, at the time, Mr. Dorsey, published all over the country, I read it in the newspapers, that's where I got it.

Mr. DORSEY (resuming): On April 15, 1913, Mr. C. M. Pickett, the district attorney of the City of San Francisco, wrote a letter——

Mr. ARNOLD: I want to object to any communication between Mr. Pickett and Mr. Dorsey—it's just a personal letter from this man, and I could write to some other person there and get information satisfactory to me, no doubt, just as Mr. Dorsey has done, and I object to his reading any letters or communications from anybody out there.

Mr. DORSEY: This is a matter of public notoriety. Here's his reply to a telegram I sent him, and in view of his statement, I have got a right to read it to the jury.

Mr. ARNOLD: You can argue a matter of public notoriety, you can argue a matter that appears in the public prints—my friend can, but as to his writing particular letters to particular men, why that's

introducing evidence, and I must object to it; he has got a right to state simply his recollection of the occurrence, or his general information on the subject, but he can't read any letters or telegrams from any particular people on the subject.

Mr. DORSEY: Mr. Arnold brought this in, and I telegraphed to San Francisco, and I want to read this telegram to the jury; can't I do it?

Mr. ARNOLD: If the Court please I want to object to any particular letter or telegram,—I can telegraph and get my information as well as he can, I don't know whether the information is true, I don't know who he telegraphed about it; I have got a right to argue a matter that appears in the public prints, and that's all I argued,—what appears in the papers,—it may be right or wrong, but if my friend has a friend he knows there, and writes and gets some information, that's introducing evidence, and I want to put him on notice that I object to it. I have got the same right to telegraph there and get my own information. And besides, my friend seems to know about that case pretty well, he's writing four months ago. Why did he do it?

Mr. DORSEY (resuming): Because I anticipated some such claim would be made in this presence.

Mr. ARNOLD: You anticipated it, then, I presume, because you knew it was published; that's what I went on.

Mr. DORSEY (resuming): I anticipated it, and I know the truth about that case.

Mr. ARNOLD: I object to his reading any communication unless I have the right to investigate it also; I am going only on what I read in the public press. April 15th is nearly two weeks before the crime is alleged to have been committed. I want to record an objection right now to my friend doing any such thing as that, reading a telegram from anybody picked out by my friend Dorsey, to give him the kind of information he wants for his speech, and I claim the right to communicate out there myself and get such information as I can, if he's given the right to do it.

The COURT: I'll either have to expunge from the jury what you told the jury, in your argument, or——

Mr. ARNOLD: I don't want it expunged. I stand on it.

The COURT: I have either got to do one of the two——

Mr. DORSEY: No, sir, can't I state to this jury, what I know about it, as well as he can state what he knows?

Mr. ARNOLD: Certainly he can, as a matter of public notoriety, but not as a matter of individual information or opinion.

110 The COURT: You can state, Mr. Dorsey, to the jury, your information about the Durant case, just like he did, but you can't read anything—don't introduce any evidence.

Mr. DORSEY (resuming): My information is that nobody has ever confessed the murder of Blanche Lamont and Minnie Williams. But, gentlemen of the jury, as I'll show you by reading this book, it was proved at the trial, and there can be no question upon the fact. Theodore Durant was guilty, the body of one of these girls having been found in the belfry of the church in question, and the other in

the basement. Here's the book containing an account of that case, reported in the 48 Pacific Reporter, and this showed, gentlemen of the jury, that the body of that girl, stripped stark naked, was found in the belfry of Emanuel church, in San Francisco, after she had been missing for two weeks. It shows that Durant was a medical student of his standing, and a prominent member of the church, with superb character, a better character than is shown by this man, Leo M. Frank, because not a soul came in to say that he didn't enjoy the confidence and respect of every member of that large congregation, and all the medical students with whom he associated. Another thing, this book shows that the crime was committed in 1895, and this man Durant never mounted the gallows until 1898, and the facts are that his mother took the remains of her son and cremated them, because she didn't want them to fall into the hands of the medical students, as they would have done in the State of California, had she not made the demand and received the body. Hence, that's all poppy-cock he was telling you about. There never was a guiltier man, there never was a man of higher character, there never was a more courageous jury or better satisfied community, than Theodore Durant, the jury that tried him, and the people of San Francisco, where he lived and committed his crime and died.

Movant says that a new trial should be granted, because of the fact that the Court did not squarely and unequivocally rule that the jury should not consider the statement Mr. Dorsey made as to the letter C. M. Pickett, the district attorney, had written, and that a new trial should be granted because the argument was illegal, unwarranted, not sustained by the evidence, and tended to inflame and unduly prejudice the jury's mind. Neither the letter from Pickett, nor the telegram was read further than is shown in the foregoing statement.

93. The movant says that a new trial should be granted because of the following ground:

The solicitor-general having, in his concluding argument, made the various statements of fact about the Durant case, as shown in the preceding ground of this motion, the judge erred in failing to charge the jury as follows, to-wit:

"The jury are instructed that the facts in other cases read or stated in your hearing are to have no influence upon you in making your verdict. You are to try this case upon its own facts and upon the opinion you entertain of the evidence here introduced."

94. Movant says that a new trial should be granted because of the following ground:

111 The solicitor-general having, in his concluding argument, made the various statements of fact about the Durant case, as shown in the preceding ground of this motion, the judge erred in failing to charge the jury as follows, to-wit:

"The jury are instructed that the facts in other cases read or stated in your hearing are to have no influence upon you in making your verdict. You are to try this case upon its own facts and upon the opinion you entertain of the evidence here introduced."

95. Because the Court should have given in charge the instruc-

tion set forth in the preceding ground, because of the following argument made by the solicitor-general, in his concluding argument to the jury, said argument being a discussion of the facts of other cases, and requiring such charge as was requested, the remarks of the solicitor-general, in conclusion, being as follows:

"Oscar Wilde, an Irish knight, a literary man, brilliant, the author of works that will go down the ages—Lady Windemere's Fan, De Profundis, which he wrote while confined in jail; a man who had the effrontery and the boldness, when the Marquis of Queensbury saw that there was something wrong between this intellectual giant and his son, sought to break up their companionship; he sued the Marquis for damages, which brought retaliation on the part of the Marquis for criminal practices on the part of Wilde, this intellectual giant; and wherever the English language is read, the effrontery, the boldness, the coolness of this man, Oscar Wilde, as he stood the cross-examination of the ablest lawyers of England—an effrontery that is characteristic of the man of his type—that examination will remain the subject matter of study for lawyers and for people who are interested in the type of pervert like this man. Not even Oscar Wilde's wife—for he was a married man and had two children—suspected that he was guilty of such immoral practices, and, as I say, it never would have been brought to light probably, because committed in secret, had not this man had the effrontery and the boldness and the impudence himself to start the proceeding which culminated in sending him to prison for three long years. He's the man who led the æsthetic movement; he was a scholar, a literary man, cool, calm, and cultured, and as I say, his cross-examination is a thing to be read with admiration by all lawyers, but he was convicted, and in his old age, went tottering to his grave, a confessed pervert. Good character? Why, he came to America, after having launched what is known as the 'æsthetic movement' in England, and throughout this country lectured to large audiences, and it is he who raised the sunflower from a weed to the dignity of a flower. Handsome, not lacking in physical or moral courage, and yet a pervert, but a man of previous good character. Abe Ruef, of San Francisco, a man of his race and religion, was the boss of the town, respected and honored, but he corrupted Schmitt, and he corrupted everything that he put his hands on, and just as a life of immorality, a life of sin, a life in which he fooled the good people when debauching the poor girls with whom he came in contact, has brought this man before this jury, so did eventually Abe Ruef's career terminate in the penitentiary. I have already referred to Durant. Good character isn't worth a cent when you have got the case before you. And crime don't go only with the ignorant and the poor. The ignorant, like Jim Conley, as an illustration, commit the small crime, and he doesn't know anything about some of this higher type of crimes but a man of high
112 intellect and wonderful endowments which, if directed in the right line, bring honor and glory; if those same faculties and talents are perverted and not controlled, as was the case with this man, they will carry him down. Look at McCue, the mayor of

Charlottesville; a man of such reputation that the people elevated him to the head of that municipality, but notwithstanding that good reputation, he didn't have rock-bed character, and becoming tired of his wife, he shot her in the bath-tub, and the jury of gallant and noble and courageous Virginia gentlemen, notwithstanding his good character, sent him to a felon's grave. Richeson, of Boston, was a preacher, who enjoyed the confidence of his flock. He was engaged to one of the wealthiest and most fascinating women in Boston, but an entanglement with a poor little girl, of whom he wished to rid himself, caused this man, Richeson to so far forget his character and reputation and his career as to put her to death. And all these are cases of circumstantial evidence. And after conviction, after he had fought, he at last admitted it, in the hope that the governor would at last save his life, but he didn't do it, and the Massachusetts jury and the Massachusetts governor were courageous enough to let that man who had taken that poor girl's life to save his reputation as the pastor of his flock, go, and it is an illustration that will encourage and stimulate every right-thinking man to do his duty. Then, there's Beattie. Henry Clay Beattie, of Richmond, of splendid family, a wealthy family, proved good character, though he didn't possess it, took his wife, the mother of a twelve-months'-old baby, out automobiling, and shot her; yet that man, looking at the blood in the automobile, joked, joked, joked! He was cool and calm, but he joked too much; and although the detectives were abused and maligned, and slush funds to save him from the gallows were used in his defense, a courageous jury, an honest jury, a Virginia jury, measured up to the requirements of the hour and sent him to his death, thus putting old Virginia and her citizenship on a high plane. And he never did confess, but left a note to be read after he was dead, saying that he was guilty. Crippen, of England, a doctor, a man of high standing, recognized ability and good reputation, killed his wife because of infatuation for another woman, and put her remains away where he thought as this man thought, that it would never be discovered; but murder will out, and he was discovered, and he was tried, and be it said to the glory of old England, he was executed."

96. Movant further says that a new trial should be granted because of the following ground:

The solicitor-general, in his concluding argument, spoke to the jury as follows:

"But to crown it all, in this table which is now turned to the wall, you have Lemmie Quinn arriving, not on the minute, but to serve your purposes, from 12:20 to 12:22 (referring to a table which the defendant's counsel had exhibited to the jury giving, as was claimed by counsel, in chronological order, the happening of events as to defendant on April 26) but that, gentlemen, conflicts with the evidence of Freeman and the other young lady, who placed Quinn by their evidence, in the factory before this time."

Whereupon the following occurred:

Mr. ARNOLD: There isn't a word of evidence to that effect; those ladies were there at 11:35 and left at 11:45, Corinthia Hall and

Miss Freeman, they left there at 11:45, and it was after they had eaten lunch and about to pay their fare before they ever saw Quinn, at the little cafe, the Busy Bee. He says that they saw Quinn over at the factory before 12, as I understood it."

Mr. DORSEY: Yes, sir, by his evidence.

113 Mr. ARNOLD: That's absolutely incorrect, they never saw Quinn there then, and never swore they did.

Mr. DORSEY (resuming): No, they didn't see him there; I doubt if anybody else saw him there, either.

Mr. ARNOLD: If a crowd of people here laughs every time we say anything how are we to hear the Court? He has made a whole lot of little misstatements, but I let those pass, but I am going to interrupt him on every substantial one he makes. He says those ladies saw Quinn—says they say Quinn was there before 12, and I say he wasn't there, and they didn't say that he was there then.

The COURT: What is it you say, Mr. Dorsey?

Mr. DORSEY: I was arguing to the jury the evidence.

The COURT: Did you make a statement to that effect?

Mr. DORSEY: I made a statement that those two young ladies say they met Holloway as he left the factory at 11:05—I make the statement that as soon as they got back down to that Greek café Quinn came in and said to them, "I have just been in and seen Mr. Frank."

Mr. ARNOLD: They never said that, they said they met Holloway at 11:45, they said at the Busy Bee Café, but they met Quinn at 12:30.

Mr. DORSEY: Well, get your record—you can get a record on almost any phase, this busy Quinn was blowing hot and blowing cold, no man in God's world knows what he did say, but I got his affidavit there.

Mr. ARNOLD: I have found that evidence, now, Mr. Dorsey, about the time those ladies saw Quinn.

Mr. DORSEY: I'll admit he swore both ways.

Mr. ARNOLD: No, he didn't either. I read from the evidence of Miss Corinthia Hall: Then Mr. Dorsey asked her: "Then you say you saw Lemmie Quinn right at the Greek café at five minutes to twelve, something like that?" A. "No, sir, I don't remember what time it was when I saw him, we went into the café, ordered sandwiches and a cup of coffee, drank the coffee and when we were waiting on the change he came in." And further on, "All he said (Quinn) was he had been up and had seen Mr. Frank, that was all he said?" A. "Yes, sir," and so on. Now the evidence of Quinn: "What sort of clock was that?"—he's telling the time he was at De Foor's pool parlor—"What sort of clock was that? A. Western Union clock. Q. What did the clock say when you looked at it? A. 12:30." And he also swore that he got back to the pencil factory at 12:20, that's in a half dozen different places.

The COURT: Anything contrary to that record, Mr. Dorsey?

Mr. DORSEY: Yes, sir, I'm going to show it by their own table that didn't occur—that don't scare anybody and don't change the facts.

The Court erred, under the foregoing facts, in not restraining the solicitor-general from making the erroneous statements of fact objected to by defendant's counsel, which the evidence did not authorize, and in permitting him to proceed, and in not rebuking the solicitor-general, and in not stating to the jury that there was no such evidence as the solicitor-general had stated, in the case, and defendant says that for this improper argument, and for this failure of the Court, there should be granted a new trial.

97. Movant further says that a new trial should be granted because of the following:

In his concluding argument Solicitor-general Dorsey, referring to the defendant's wife, and referring to the claim made by
114 the solicitor-general that the defendant's wife had not visited him for a certain time after he was first imprisoned, told the jury:

"Do you tell me that there lives a true wife, conscious of her husband's innocence, that wouldn't have gone through snap-shotters, reporters and everything else, to have seen him."

Whereupon the following colloquy ensued:

Mr. ARNOLD: I must object to as unfair and outrageous an argument as that, that his wife didn't go there through any consciousness of guilt on his part. I have sat here and heard the unfairest argument I have ever heard, and I can't object to it, but I do object to his making any allusion to the failure of the wife to go and see him; it's unfair, it isn't the way to treat a man on trial for his life.

The COURT: Is there any evidence to that effect?

Mr. DORSEY: Here is the statement I have read.

Mr. ARNOLD: I object to his drawing any conclusions from his wife going or not going, one way or the other—it's an outrage upon law and decency and fairness.

The COURT: Whatever was in the evidence or the statement I must allow it.

Mr. DORSEY (resuming): Let the galled jade wince——

Mr. ARNOLD: I object to that, I'm not a "galled jade," and I've got a right to object. I'm not galled at all, and that statement is entirely uncalled for.

The COURT: He has got the right to interrupt you.

Mr. DORSEY: You've had your speech.

Mr. ROSSER: And we never had any such dirty speech as that either.

Mr. DORSEY: I object to his remark, your Honor, I have a right to argue this case.

Mr. ROSSER: I said that remark he made about Mr. Arnold, and your Honor said it was correct; I'm not criticising his speech, I don't care about that.

Mr. DORSEY (resuming): Frank said that his wife never went back there because she was afraid that the snap-shotters would get her picture,—because she didn't want to go through the line of snap-shotters. I tell you, gentlemen of the jury, that there never lived a woman, conscious of the rectitude and innocence of her hus-

band, who wouldn't have gone to him through snap-shotters, reporters and advice of any Rabbi under the sun. And you know it.

Movant says that the Court erred in not taking positive action, under the circumstances aforesaid, and in not restraining the Solicitor-General from making his unfounded and unjust inferences from the alleged failure of the defendant's wife to visit him, which was not authorized by the evidence in the case, and erred in allowing the Solicitor-General to argue upon this subject at all, and erred in not admonishing the jury that such argument could not be considered and should have no weight with the jury, and the Court erred in not rebuking the Solicitor-General for making the reply which he made to the interruption, to the effect "Let the galled jade wince," and erred in not rebuking the Solicitor-General for such unjust comments upon a merited interruptoin,—and because of such failures of the Court, and because of the aforesaid erroneous, unjust and unfounded arguments of the Solicitor-General, movant says that a new trial should be granted.

115 98. Movant says that a new trial should be granted because of the following:

The Solicitor-General, in his concluding argument to the jury, spoke as follows:

If there be a negro who accuses me of a crime of which I am innocent, I tell you, and you know it's true, I'm going to confront him, even before any attorney, no matter who he is, returns from Tallulah Falls, and if not then, I will tell you just as soon as that attorney does return, I'm going to see that that negro is brought into my presence, and permitted to set forth his accusations. You make much here of the fact that you didn't know what this man Conley was going to say when he got on the stand. You could have known it, but you dared not do it.

Whereupon the following coloquy ensued:

Mr. ROSSER: May it please the Court, that's an untrue statement; at that time when he proposed to go through that dirty farce, with a dirty negro, with a crowd of policemen, confronting this man, he made his first statement,—his last statement he said, and these addendas, nobody ever dreamed of them, and Frank had no chance to meet them; that's the truth. You ought to tell the truth; if a man is involved for his life; that's the truth.

Mr. DORSEY (resuming): It don't make any difference about your addendas and you may get up there just as much as you want to, but I'm going to put it right up to this jury——

Mr. ROSSER: May it please the Court, have I got the right to interrupt him when he mis-states the facts?

The COURT: Whenever he goes outside of the record.

Mr. ROSSER: Has he got the right to comment that I haven't exercised my reasonable rights?

The COURT: No, sir, not if he has done that.

Mr. ROSSER: Nobody has got a right to comment on the fact that I have made a reasonable objection.

Mr. DORSEY: But I'm inside of the record, and you know it, and

the jury knows it. I said, may it please your Honor, that this man, Frank, declined to be confronted by this man Conley.

Mr. ROSSER: That isn't what I objected to, he said that at that meeting that was proposed by Conley, as he says, but really proposed by the detectives, when I was out of the city, that if that had been met, I would have known Conley's statement, and that's not true; I would not have been any wiser about his statement than I was here the other day.

The COURT: You can comment upon the fact that he refused to meet Frank or Frank refused to meet him, and at the time he did it, he was out of the city.

Mr. ARNOLD: We did object to that evidence, Your Honor, but Your Honor let that in.

The COURT: I know; go on.

Mr. DORSEY (resuming): They see the force of it——

Mr. ROSSER: Is that a fair comment, Your Honor, if I make a reasonable objection, to say that we see the force of it.

The COURT: I don't think that, in reply to your objection, is a fair statement.

116 Mr. DORSEY (resuming): Now, may it please Your Honor, if they don't see the force of it, you do——

Mr. ROSSER: I want to know, is Your Honor's ruling to be absolutely disregarded like that?

The COURT: Mr. Dorsey, stay inside of the record, and quit commenting on what they say and do.

Mr. DORSEY: I am inside of the record, and Your Honor knows that's an entirely proper comment.

Mr. ROSSER: Your Honor rules—he says one thing and then says your Honor knows better.

Mr. DORSEY: Your Honor knows I have got a right to comment on the conduct of this defendant.

The COURT: Of course, you have, but when they get up and object, I don't think you have any right to comment on their objections as they are making them to the Court.

Mr. DORSEY: I don't?

The COURT: No, I don't think so.

Mr. DORSEY: Isn't everything that occurs in the presence of the Court the subject matter for comment?

The COURT: No, I don't think you can comment on these things. You can comment on any conduct within the province of this trial, but if he makes an objection that's sustained, why, then you can't comment on that.

Mr. DORSEY: Does your Honor say I'm outside of the record?

The COURT: No, I don't, but I say this, you can comment on the fact that Frank refused to meet this man, if that's in the record, you have the right to do that.

Mr. DORSEY (resuming): This man Frank, with Anglo-Saxon blood in his veins, a graduate of Cornell, the superintendent of the pencil factory, so anxious to ferret out this murder that he 'phoned Schiff three times on Monday, April 28th, to employ the Pinkerton Detective Agency, this man of Anglo-Saxon blood and intelligence,

refused to meet this ignorant negro, Jim Conley. He refused upon the flimsy pretext that his counsel was out of town but when his counsel returned, when he had the opportunity to know at least something of the accusations that Conley brought against this man, he dared not let him meet him.

Movant says that the Court erred in allowing the Solicitor-General to comment upon an alleged failure of the defendant to meet the witness, Conley and erred, when the defendant's counsel objected and interrupted him, the same not being authorized by the evidence, and erred in not stopping the Solicitor-General, and erred in not making a decisive and unequivocal ruling that such comment was improper, and should not influence the jury, and further erred in allowing the Solicitor-General to comment, as he did in the foregoing statement of facts, upon the interruption; and the Court expressly erred in ruling that the Solicitor-General could comment upon the fact that Frank refused to meet Conley; and because of such failures and errors on the Court's part, and because of such improper and prejudicial argument by the Solicitor-General, the movant says that a new trial should be granted him.

99. Movant further says that a new trial should be granted because of the following:

117 The Solicitor-General, in his concluding argument, referring to the visit of the defendant to Bloomfield's undertaking establishment, on April 27, made the following remarks to the jury:

Frank says that he visited the morgue not only once but twice. If he went down there and visited that morgue, and saw that child and identified her body, and it tore him all to pieces, as he tells you it did, let any honest man, I don't care who he be, on this jury, seek to fathom the mystery of this thing; tell me why it was, except for the answer I give you, he went down there to view that body again. Rogers says he didn't look at it; Black says he didn't see him look at it.

Whereupon the following occurred:

Mr. ROSSER: He is mis-stating the evidence. Rogers never said he didn't look at the body, he said he was behind him, and didn't know whether he did or not; and Black says he didn't know whether he did nor not.

Mr. DORSEY: Rogers said he never did look at that body.

Mr. ARNOLD: I insist that isn't the evidence. Rogers said he didn't know, and couldn't answer whether he saw it or not, and Black said the same thing.

Mr. DORSEY (resuming): I am not going to quibble with you. The truth is, and you know it, that when that man Frank went down there to look at that body of that poor girl, to identify her, that he never went in that room, and if he did look at her long enough to identify her, neither John Black nor Rogers nor Gheesling knew it. I tell you, gentlemen of the jury, that the truth of this thing is that Frank never looked at the body of that poor girl, but if he did, it was just a glance, as the electric light was flashed on and immediately turned and went into another room.

Mr. ROSSER: There isn't a bit of proof that he went into another room, I object again, sir, there isn't a particle of proof of that.

The COURT: Look it up and see what was said.

Mr. DORSEY: I know this evidence.

Mr. ROSSER: If your Honor allows it to go on, there's no use looking it up. He never said anything about going into another room.

The COURT: What is your remembrance about that.

Mr. ROSSER: It isn't true, your Honor.

Mr. DORSEY: I challenge you to produce it.

Mr. ROSSER: There's no use to challenge it, if he goes on and makes the argument they make, those deductions for which there's no basis, but when he makes a mis-statement of the evidence, it's perfectly useless to go on and look it up, and we decline to look it up.

Mr. DORSEY: I insist that they look it up. I insist that I am sticking to the facts.

Mr. ROSSER: No, your are not.

The COURT: Well, if you'll give me the record, I'll look it up. Mr. Haas, look that up, and see what is the fact about it.

Mr. DORSEY: I know what Boots Rogers said myself.

The COURT: The jury knows what was said.

Mr. DORSEY: That's quibbling.

Mr. ARNOLD: Is that correct, your Honor?

The COURT: No, that's not correct; whenever they object, Mr. Dorsey, if you don't agree upon any record, have it looked up, and if they are right and you know it, and you are wrong, or if they are wrong and you also know it, if they are wrong they are quibbling, and if they are right they are not quibbling. Now, just go on.

118 Mr. ROSSER: Now, the question of whether Boots said he went into that room is now easily settled. (Mr. Rosser here read that portion of the cross examination of the witness Rogers, stating that when Frank left the door of the undertaking room, he went out of his view.)

Mr. DORSEY: Well, that's cross examination, ain't it?

Mr. ROSSER: Yes, but I presume he would tell the truth on cross examination, I don't know; he passed out of his view, he didn't say he went into a room.

Mr. DORSEY: Correct me if I'm wrong. Boots Rogers said he didn't go where the corpse lay, and that's the proposition we lay down.

Mr. ROSSER: That isn't the proposition either; now you made a statement that isn't true, the other statement isn't true. Rogers said that when he left "he went out of my view," he was practically out of his view all the time. I was just trying to quote the substance of that thing.

Mr. DORSEY (resuming): He wanted to get out of the view of any man who represented the majesty and dignity of the law, and he went in behind curtains or any old thing that would hide his countenance from these men. And he said on the leading examination——

Mr. ROSSER: I don't know what you led out of him, but on the cross he told the truth.

Movant shows that under the foregoing facts, the Court erred in not making any ruling at all, and erred in allowing the Solicitor-General to proceed with his illegal argument, which was not founded on the evidence, and erred, and in not rebuking the Solicitor-General, and in not stating to the jury that the Solicitor-General had mis-stated the evidence in the particulars objected to, and erred in not telling the jury that there was no evidence in the case that Rogers had sworn that defendant did not look at the body of Mary Phagan, or that Frank went into another room; and because of the aforesaid errors in acting and failing to act, on the part of the Court, and because of such illegal and improper argument of the Solicitor-General, a new trial should be granted.

100. Movant further says that a new trial should be granted because of the following:

The Solicitor-General, in his concluding argument, spoke as follows to the jury, the subject under discussion being the whereabouts of the key to the elevator box on Sunday morning, April 27, the language of the Solicitor-General being as follows:

"Why don't they bring the fireman here who went around and gave such instructions? First, because it wasn't necessary, they could have cut the electricity off and locked the box. And second, they didn't bring him because no such man ever did any such thing, and old Holloway told the truth before he came to the conclusion that old Jim Conley was his nigger, and he saw the importance of the proposition that when Frank went there Sunday morning the box was unlocked and Frank had the key in his pocket."

Whereupon the following occurred:

Mr. ROSSER: You say Mr. Frank had the key in his pocket? No one mentioned it, that isn't the evidence; I say it was hung up in the office, that's the undisputed evidence.

119 Mr. DORSEY: Holloway says when he got back Monday morning it was hung up in the office, but Boots Rogers said this man Frank—and he was sustained by other witnesses—when he came there to run that elevator Sunday morning, found that power box unlocked.

Mr. ROSSER: That's not what you said.

Mr. DORSEY: Yes, it is.

Mr. ROSSER: You said Frank had the key in his pocket next morning, and that isn't the evidence, there's not a line to that effect.

The COURT: Do you still insist that he had it in his pocket?

Mr. DORSEY: I don't care anything about that; the point of the proposition, the gist of the proposition, the force of the proposition is that old Holloway stated, way back yonder in May, when I interviewed him, that the key was always in Frank's office; this man told you that the power box and the elevator was unlocked Sunday morning and the elevator started without anybody going and getting the key.

Mr. ROSSER: That's not the point he was making; the point he was making, to show how clearly Frank must have been connected with it, he had the key in his pocket. He was willing to say that, when he ought to know that's not so.

The COURT: He's drawing a deduction that he claims he's drawing.

Mr. ROSSER: He doesn't claim that. He says the point is it was easily gotten in the office, but that's not what he said."

The COURT: You claim that's a deduction you are drawing?

Mr. DORSEY: Why, sure.

The COURT: Now, you don't claim the evidence shows that?

Mr. DORSEY: I claim the power box was standing open Sunday morning.

The COURT: Do you insist that the evidence shows he had it in his pocket?

Mr. DORSEY: I say that's my recollection, but I'm willing to waive it; but let them go to the record, and the record will sustain me on that point, just like it sustains me on the evidence of this man Rogers, which I'm now going to read.

Movant says that the Court erred in not rebuking the Solicitor-General for the foregoing improper argument which was not warranted by the evidence, and erred in not stating to the jury that there was no evidence that Frank had the key in his pocket, and in allowing the Solicitor-General to proceed unrebuked and uninterrupted with said illegal argument, and in not making a square and decisive ruling, upon the objection of the defendant, and in allowing the Solicitor-General to proceed with said claim that Frank had the key in his pocket, as a deduction, the same being totally unwarranted; and for said illegal and erroneous actions, and failures to act, by the Court, and for said illegal and improper argument, a new trial should be granted.

101. Movant says that a new trial should be granted, because of the following:

The Solicitor-General, in his concluding argument, in referring to the testimony of the physicians introduced by the defendant, spoke as follows:

"It wouldn't surprise me if these able, astute gentlemen, vigilant as they have shown themselves to be, didn't go out and get some doctors who have been the family physicians and who are well known to some of the members of this jury, for the effect it might have upon you."

120 Whereupon the following colloquy occurred:

Mr. ARNOLD: There's not a word of evidence as to that, that's a grossly improper argument, and I move that that be withdrawn from the jury.

Mr. DORSEY: I don't state it as a fact, but I am suggesting it.

Mr. ARNOLD: He has got no right to deduct it or suggest it. I just want your Honor to reprove it, reprimand him and withdraw it from the jury; I just make the motion, and your Honor can do as you please.

Mr. DORSEY (resuming): I am going to show that there must have been something besides the training of these men, and I'm going to contrast them with our doctors.

Mr. ARNOLD: I move to exclude that as grossly improper. He

says he's arguing that some physician was brought here because he was the physician of some member of the jury, it's grossly unfair and it's grossly improper and insulting even, to the jury.

Mr. DORSEY: I say it's eminently proper and absolutely a legitimate argument.

Mr. ARNOLD: I just record my objection, and if your Honor lets it stay in, you can do it.

Mr. DORSEY: Yes, sir; that wouldn't scare me, your Honor.

The COURT: Well, I want to try it right, and I suppose you do. Is there anything to authorize that inference to be drawn?

Mr. DORESY: Why, sure, why the fact that you went out and got general practitioners, that know nothing about the analysis of the stomach, know nothing about pathology.

The COURT: Go on, then.

Mr. DORSEY: I thought so.

Mr. ARNOLD: Does your Honor hold that is proper, "I thought so?"

The COURT: I hold that he can draw any inference legitimately from the testimony and argue it, I don't know whether or not there is anything to indicate that any of these physicians *was* the physicians of the family.

Mr. ROSSER: Let me make the suggestion, your Honor ought to know that before you let him testify it.

The COURT: He says he don't know it, he's merely arguing it from an inference he has drawn.

Mr. DORSEY (resuming): I can't see any other reason in God's world for going out and getting these practi-oners, who had never had any special training on stomach analysis, and who have not had any training with the analysis of tissues, like a pathologist has had, except upon that theory.

Movant shows that the Court erred in not rebuking the Solicitor-General for making such improper argument which was not authorized by the evidence, and in not stating to the jury that there was not a particle of evidence to the effect that any of the physicians were family physicians of any of the jurors, or that any of the physicians were put upon the stand for the effect it might have upon them for such reason; and the Court erred in allowing the Solicitor-General to proceed with such improper, unwarranted and highly prejudicial argument, and erred in allowing the Solicitor-General to comment, as the foregoing colloquy shows, upon the well-merited interruptions by defendant's counsel; and for such erroneous actions, failures to act, by the Court, and for such illegal, unfounded and prejudicial argument, the defendant says that a new trial should be granted.

121 102. Movant further says that a new trial should be granted because of the following:

The Solicitor-General, in his concluding argument, in referring to act of Judge Roan discharging the witness, Conley, from custody, stated:

"Judge Roan did it, no reflection on the Sheriff, but with the friends of this man, Frank, pouring in there at all hours of the night,

offering him sandwiches and whiskey and threatening his life, things that this Sheriff, who is as good as the Chief of Police but no better, couldn't guard against because of the physical structure of the jail, Jim Conley asked, and His Honor granted the request, that he be remanded back into the custody of the honorable men who manage the police department of the City of Atlanta."

Whereupon the following occurred:

Mr. ROSSER: No, that's a mistake, that isn't correct, your Honor discharged him from custody, he said that under that petition your Honor sent him back to the custody where you had him before, and that isn't true. Your Honor discharged him, vacated the order, that's what you did.

Mr. DORSEY: Here's an order committing him down there first—you are right about that, I'm glad you are right one time.

Mr. ROSSER: That's more than you have ever been.

Mr. DORSEY (resuming): No matter what the outcome of the order may have been, the effect of the order passed by His Honor, Judge Roan, who presides in this case, was to remand him into the custody of the police of the City of Atlanta.

Mr. ROSSER: I dispute that, that isn't the effect of the order passed by his Honor, the effect of the order passed by his Honor was to turn him out, and they went through the farce by turning him out on the street and carrying him back. That isn't the effect of your Honor's judgment. In this sort of case, we ought to have the exact truth.

The COURT: This is what I concede to be the effect of that ruling: I passed this order upon the motion of State's counsel, first, is my recollection, and by consent of Conley's attorney.

Mr. ROSSER: I'm asking only for the effect of the last one.

The COURT: On motion of State's counsel, consented to by Conley's attorney, I passed the first order, that's my recollection. Afterwards, it came up on motion of the Solicitor-General, I vacated both orders, committing him to the jail and also the order, don't you understand, transferring him; that left it as though I had never made an order, that's the effect of it.

Mr. ROSSER: Then the effect was that there was no order out at all?

The COURT: No order putting him anywhere?

Mr. ROSSER: Which had the effect of putting him out?

The COURT: Yes, that's the effect, that there was no order at all."

Mr. DORSEY (resuming): First, there was an order committing him to the common jail of Fulton county; second, he was turned over to the custody of the police of the city of Atlanta, by an order of Judge L. S. Roan; third, he was released from anybody's custody, and except for the determination of the police force of the City of Atlanta, he would have been a liberated man, when he stepped into this Court to swear, or he would have been spirited out of the State of Georgia, so his damaging evidence couldn't have been adduced against this man.

The Court erred in allowing the Solicitor-General to make the foregoing argument, over objection, which was not authorized by the

evidence, and in not rebuking and correcting the Solicitor-General; and because of such failures to act and erroneous actions, by
122 the Court, and because of such improper and illegal argument, movant says a new trial should be granted.

103. Because the Court erred in failing to charge the jury, in reference to the witness, Jim Conley, that if the witness wilfully and knowingly swore falsely as to a material matter, his testimony ought to be disregarded entirely, unless corroborated by the circumstances, or the testimony of other unimpeached witnesses.

The Court erred in failing to charge the jury that, if they believed from the evidence, that Conley watched for Frank, and that his purpose in watching was to assist in the commission of the crime of sodomy by Frank upon the person of Mary Phagan, sodomy being a felony, that then, Conley as to any alleged murder committed in the progress of any such attempt to commit sodomy, would be an accomplice; and the jury could not give credit to his testimony, unless corroborated by the facts and circumstances, or by other witnesses.

ROSSER & BRANDON,
HERBERT J. HAAS,
REUBEN R. ARNOLD,
Movant's Attorneys.

123 **EXHIBIT A.**

GEORGIA,
Dougherty County:

In Superior Court, Fulton County, Georgia.

STATE OF GEORGIA
v.
LEO M. FRANK.

Indictment for Murder.

Motion for New Trial.

Before me personally appeared R. L. Gremer, who being duly sworn deposes and says that he makes this affidavit to be used on the motion for new trial in the above case.

Further deposing he says that he is a resident of Albany, Ga., that he is acquainted with Mack Farkas, who works with Mr. Sam Farkas, who operates a livery stable and sale barn in Albany.

Further deposing, he says that between the time of the murder of Mary Phagan, and the trial of Leo M. Frank, the exact date this deponent can not state, deponent was standing in front of Mr. Sam Farkas's place of business on Broad Street in Albany, in the presence of Mack Farkas and others, including a party by the name of A. H. Henslee; said Henslee is the same party whose picture appears on page 2 of the Atlanta Georgian issue of August the 26th,

and on page 2 of the issue of the same paper of August 23rd, as a juror in the Frank case.

At said time and place, deponent heard the said Henslee express his conviction that Frank was guilty of the murder of Mary Phagan; his exact language was "there can be no doubt that Frank is guilty. I know he is guilty," referring to the murder of Mary Phagan.

Further deposing he says, he stated to said Henslee "It is queer that a man of Frank's standing could be guilty of such a crime." Henslee said, "Without a doubt he is guilty." Deponent said "What do you mean by without a doubt?" Henslee said positively, "Without a doubt to my mind or to anyone else."

R. L. GREMER.

Sworn to and subscribed before me Sept. 4th, 1913.

L. L. FORD,
Notary Public, Dougherty County, Georgia.

EXHIBIT B.

GEORGIA,
Dougherty County:

In the Superior Court, Fulton County, Georgia.

STATE OF GEORGIA
v.
LEO M. FRANK.

Indictment for Murder.

Motion for New Trial.

Before me, personally appeared Mack Farkas, who being duly sworn makes this affidavit, to be used on the motion for a new trial in the above case.

Deposing, he says that he is a resident of Albany, Ga., and is connected with Sam Farkas, Esq., who runs a livery stable and sale barn in Albany; further deposing, he says that between the time of the murder of Mary Phagan, and the trial of Leo Frank, he heard a party discussing the case in front of the place of business of the said Sam Farkas, in Albany, Ga., in the presence of this deponent and others, including one R. L. Gremer, also a resident of Albany, Ga., said party, whom this deponent recollects as being named Henslee, and whose picture appears on page 2 of the Atlanta Georgian of August 23rd, and on page 2 of the Atlanta Georgian of August 26th, as being one of the Frank jury, expressed
124 himself as being convinced of Leo M. Frank's guilt of the murder of Mary Phagan; the exact language used by said party, deponent does not recollect, but his recollection is that he

used the words "I believe Frank is guilty," referring to the murder of Mary Phagan.

MACK FARKAS.

Sworn to and subscribed before me this September 4, 1913.

L. L. FORD,
Notary Public, Dougherty County, Georgia.

EXHIBIT C.

GEORGIA,
Fulton County:

Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appears Julian A. Lehman, who being duly sworn makes this affidavit to be used on the motion for new trial in the above case.

Further deposing he says that he is personally acquainted with A. H. Henslee, one of the jurors in the above case; that on June 2, 1913, between Atlanta, Ga., and Experiment, Ga., the said Henslee expressed his opinion that Frank was guilty of the murder of Mary Phagan, and that this was in deponent's presence and hearing; and in the hearing of other persons on the train at the time; the words used to the best of deponent's knowledge and recollection were "Frank is as guilty as a damned dog, and ought to have his God damned neck broke;" this was in reference to Leo M. Frank, and before the trial.

Again, on June 20, 1913, the said Henslee made practically the same statement of and concerning the connection of Leo M. Frank with the murder of Mary Phagan in deponent's hearing.

On both occasions the said Henslee showed great feeling, he expressed the aforesaid conviction firmly and positively and vehemently.

JULIAN A. LEHMAN.

Sworn to and subscribed before me, this the 12th day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

EXHIBIT D.

GEORGIA,
County of Fulton:

In Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me, the undersigned officer authorized by law to administer oaths, personally appeared Samuel Aron, who being first duly sworn, deposes and says on oath as follows:

Deponent says that just after the indictment of Leo M. Frank for murder, as near as he can recall about two days after the indictment, this deponent was at the Elks Club on Ellis Street, Atlanta, Georgia; that at that time he saw one A. H. Henslee, not then known to this deponent by name, but now known
125 and recognized by this deponent as one of the jurors who tried the Frank case and returned a verdict of guilty; said A. H. Henslee was at said Elks Club at the time mentioned, and made the statement in this deponent's hearing: "I am glad they indicted the God dam Jew. They ought to take him out and lynch him. And if I get on that jury I'd hang that Jew sure." This statement was made in connection with the indictment of Leo M. Frank for the murder of Mary Phagan, and made in this deponent's hearing by the said A. H. Henslee, who afterwards served on said jury and brought in a verdict of guilty.

At this time this deponent left the Club, not caring to get into the argument, which was becoming heated and which was very condemnatory of Leo M. Frank by the said A. H. Henslee.

SAMUEL ARON.

Sworn to and subscribed before me this 3rd day of October, A. D. 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

Exhibit E.

State of Georgia,
County of Fulton:

Fulton Superior Court.

State of Georgia
vs.
Leo M. Frank.

Before me personally appeared L. Z. Rosser, Morris Brandon, R. R. Arnold, and H. J. Haas, who, being duly sworn, depose and say that they are the sole counsel of defendant in the above case, and they make this affidavit to be used as evidence on the motion for new trial in said case.

Further deposing, they say that, since the trial of said case and the verdict and sentence therein, it has come to their knowledge that two of the jurors who sat on said case, to-wit: M. Johenning and A. H. Henslee were prejudiced, partial and biased against Leo M. Frank, the defendant, as evidenced by affidavits attached to motion and hereinafter referred to; that said prejudice, partially and bias were present on their part, when said Johenning and Henslee qualified as jurors in said case as shown by said affidavits, but that the facts were unknown to these deponents at the time of the trial of said case, and at the time said jurors qualified on the voir dire of said case: and these deponents had no means of knowing said facts until after said trial.

Further deposing, they say that not until after the trial of said case did they know or have any means of knowing that said Johenning and Henslee, or either of them, had made any statement of any kind to, or in the presence of, any of the following persons, to-wit: H. C. Lovenhart, Mrs. J. G. Lovenhart, Miss Mariam Lovenhart, S. Aron, Mack Farkas, R. L. Gremer, Jno. M. Holmes, Shi Gray, S. M. Johnson, J. J. Nunnally, W. L. Ricker, J. A. Lehman, C. P. Stough, or any other person, of and concerning said Leo Frank in connection with the murder of Mary Phagan, or in connection with said trial, or the possible outcome of said trial.

Further deposing they say that they have been guilty of no laches in this matter, but that they have used every means of obtaining the facts in connection with statements made by said persons, and all of them, and all of said statements have come to their knowledge since the rendition of the verdict and sentence in said case, as is shown by the dates mentioned in the jurats to
126 each affidavit, and deponents have brought same to the attention of the Court at the earliest possible moment at which the Court could take cognizance of said affidavits after the trial, which is the date on which the rule nisi is on return that is October 4, 1913, same being on that day presented to the Court as part of the motion for new trial.

Further deposing, deponents say that, had they known at the trial of any of the facts or statements of the jurors, which would disqualify, or tend to disqualify, said jurors, or either of them, when said jurors were put upon the voir dire in said case, these deponents would have brought the same to the attention of the Court at said time.

L. Z. ROSSER.
MORRIS BRANDON.
REUBEN R. ARNOLD.
HERBERT J. HAAS.

Sworn to and subscribed before me, by each of the above fournamed deponents, this October 22, 1913.

E. D. THOMAS,
Notary Public, Fulton County, Georgia.

EXHIBIT F.

GEORGIA,
Fulton County:

Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared Mrs. Jennie G. Loevenhart, who makes this affidavit to be used on motion for a new trial in the above stated case.

Deposing on oath she says that she is personally acquainted with M. Johenning, one of the jurors who served in the trial of Leo M. Frank for the murder of Mary Phagan.

Further deposing she says that during May, 1913, said M. Johenning met deponent and deponent's daughter on Forsyth Street, Atlanta, Georgia, and then and there the said M. Johenning expressed to the deponent and deponent's daughter his firm belief that Leo M. Frank was guilty of the murder of Mary Phagan. This statement was made by M. Johenning forceably and positively as his profound conviction.

MRS. JENNIE G. LOEVENHART.

Sworn to and subscribed before me this 26th day of September, 1913.

C. W. BURKE,
Notary Public, Fulton County, Georgia.

EXHIBIT G.

GEORGIA,
Fulton County:

Fulton Superior Court.

STATE OF GEORGIA,
vs.
LEO M. FRANK.

Before me personally appeared H. C. Loevenhart, who makes this affidavit to be used on motion for a new trial in the above stated case.

Deposing on oath he says that for some eighteen months prior to July, 1913, he was connected with the Hodges Broom Works in the city of Atlanta; that he is personally acquainted with
127 M. Johenning, one of the jurors in the above stated case, and that during the month of May, 1913, said M. Johenning had a conversation with this deponent, in which he discussed the death of little Mary Phagan.

Further deposing he says that in said conversation the said juror, M. Johenning, expressed his opinion to deponent that Frank was guilty of the murder of Mary Phagan, and that it was his profound conviction.

H. C. LOEVENHART.

Sworn to and subscribed before me this 2nd day of September, 1913.

C. W. BURKE,
Notary Public, Fulton County, Georgia.

EXHIBIT H.

GEORGIA,
Fulton County:

Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me personally appeared Miss Miriam Loevenhart, who makes this affidavit to be used on motion for a new trial in the above stated case.

Deposing on oath she says that she is personally acquainted with M. Johenning, a juror, who served in the above stated case; she says that pror to the trial of Leo M. Frank, said juror, M. Johenning, had a conversation with this deponent and deponent's mother, and

in their presence expressed his profound conviction that Leo M. Frank was certainly guilty of the murder of Mary Phagan.

Further deposing she says that said M. Johenning made this statement, positively, almost vehemently, and that his exact language, which was in response to a remark from this deponent in reference to the case was, as near as deponent recalls, "I know that he is guilty," referring to Leo Frank. Said M. Johenning made this statement more than once to this deponent before the commencement of the trial of Leo M. Frank for murder.

MIRIAM LOEVENHART.

Sworn to and subscribed before me this 2d day of September, 1913.

C. W. BURKE,
Notary Public, Fulton County, Georgia.

EXHIBIT I.

GEORGIA,
Fulton County:

In Fulton Superior Court, July Term, 1913.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Conviction of Murder.

Motion for New Trial.

Personally came before the undersigned, Leo M. Frank, who upon oath says that he is the defendant in the above stated case, and that his sole counsel in said case were L. Z. Rosser, Morris Brandon, R. R. Arnold and H. J. Haas.

128 Affiant further says that at and before said trial was entered on, and during the whole of said trial that affiant had no knowledge whatsoever as to M. Johenning and A. H. Henslee, two of the jurors, being prejudiced, partial and biased in said case, as evidenced by the affidavits of H. C. Lovenhart, Mrs. J. C. Lovenhart, Miss Marian Lovenhart, S. Aron, Max Farkas, R. L. Grener, John W. Holmes, Shi Gray, S. M. Johnson, J. J. Nunnally W. L. Ricker, J. A. Lehman, and C. P. Stough. Affiant did not know either of said jurors and had never seen or heard of them before.

Further deposing, affiant says that he did not know until after the trial, and did not have any means of knowing until after said trial, that said Johenning and said Henslee, or either of them, had made any statement of any kind to or in the presence of any of the persons hereinbefore named. Affiant further says that before said trial, at the time of entering upon said trial, and during said

trial, he had no knowledge or means of knowing that said persons were prejudiced, partial or biased as is shown by the affidavits or depositions of the persons named, and the facts stated in said affidavits and depositions were unknown to this affiant until after the verdict and sentence in this case. He further says that he has been guilty of no laches in this matter, and has, together with his counsel, used all the means at hand to obtain the facts and circumstances in connection with the statements made by said parties and all of them. The said facts were discovered after the verdict and sentence of the court in the case above stated, and the affidavits of said witnesses were taken on the dates shown in the jurat to each affidavit, and the same are brought to the attention of the Court by being presented on the day for the return of the rule nisi, which is October 4th, 1913, and which is the earliest time at which such affidavits could be brought to the attention of the Court.

Affiant further says that had he known at the trial of any facts or statements which would disqualify, said jurors, or either of them, when said jurors were upon their voir dire in said case, that this affiant would have had his counsel bring the same to the attention of the Court promptly at that time.

LEO M. FRANK.

Sworn to and subscribed before me this 3rd day of October, 1913.

SAML. H. BREWTON,
Notary Public, Fulton County, Georgia.

EXHIBIT J.

GEORGIA,
Fulton County:

No. —.

Fulton Superior Court.

STATE OF GEORGIA
versus
LEO M. FRANK.

Personally appeared W. P. Neill, who makes this affidavit to be used on a motion for new trial in the above stated case.

Deposing he says on oath that he was present in the court-room during the trial of Leo M. Frank for the murder of Mary Phagan, for two full days during the trial, and from time to time on other days; that at the time of the facts hereinafter stated, deponent was sitting just where the jury passed by going from the jury box to the rear end of the court-room, he was sitting on the front row of the spectators' benches.

129 During the course of the trial deponent saw the jury pass to the jury box from the rear of the court room, the jury

passed immediately by this deponent and also by a man, whose name is unknown to this deponent, but who was a spectator in the court room, who was sitting about three feet from this deponent, just across the aisle, no one being between this man and deponent; as the jury passed this man, at the time specified, this man took hold of one of the jurors, he took the juror by the hand with one hand and grasped his arm with the other hand and made a statement to him, said something to the juror which this deponent did not understand sufficiently to be able to quote, but this deponent says that he made some statement to the juror while he had him thus by the hand and arm.

Further deposing he says that this act was witnessed by Plennie Minor, so this deponent believes, for the reason that as soon as this happened, the said Plennie Minor immediately came back to this man and threatened to put him out of the court.

Plennie Minor told this man that he, Plennie Minor, saw him, the man, take the juror by the hand and say something to him; the man remonstrated with Plennie Minor, and this deponent heard Plennie Minor repeat to him that he, Plennie Minor, saw him, the man, speak to the juror.

Deponent further says that on two occasions, while he was sitting in the court-room, at the trial, at one time while he was about six to ten feet from the jury, this deponent heard shouts and cheering on the outside of the house from the crowds collected outside. One of said times was during Dorsey's speech.

While this deponent does not say whether or not the jury heard this cheering, he does say that he, the deponent, heard it, plainly and distinctly and was within a few feet of the jury at the time he heard it.

W. P. NEILL.

Sworn to and subscribed before me this September 9, 1913.

VIRLYN B. MOORE,
Notary Public, Fulton County, Georgia.

Further deposing he says that on an occasion he heard cheering in the court-room; the Judge said that unless the cheering stopped he would have to clear the court-room; and to this, Deputy Sheriff Minor replied that that would be the only way he could stop the cheering in the court-room.

W. P. NEILL.

Sworn to and subscribed before me this September 9, 1913.

VIRLYN B. MOORE,
Notary Public, Fulton County, Georgia.

EXHIBIT K.

GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned, a Notary Public in and for said county, B. M. Kay, who on oath says that he is a resident of the city of Atlanta, living at No. 264 South Pryor Street. Deponent says further that on Saturday evening, August 23, 1913, about 8 or 8:30 o'clock, p. m., he was driving in his father's automobile down South Pryor Street, going south, there being in
130 the automobile with him his mother, Mrs. Rose Kay, and his brother, Sampson Kay; that as the automobile approached the corner of South Pryor and East Fair Streets, he observed the Jurymen in the Frank case turn into South Pryor from the east, out of East Fair Street, and deponent stopped his automobile to look at the jury, and upon doing so noticed that walking alongside the jury were some six or seven other men. Deponent was on the west side of South Pryor Street while the jury in the above entitled case was walking north along the east side of Pryor Street. Deponent's brother Sampson Kay got out of the automobile stating to deponent that he was going to follow the jury.

B. M. KAY.

Sworn to and subscribed before me this 4th day of September, 1913.

ROBT. C. PATTERSON.
Notary Public, Fulton County, Georgia.

EXHIBIT L.

GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned, a Notary Public in and for said county, Miss Martha Kay, who on oath says that on the last day of the trial of Leo M. Frank in above stated case, August

25th, 1913, she was present in the court room and when the audience applauded Judge Roan stated to the sheriff that the cheering and demonstrations would have to stop or the court room would have to be cleared, to which the sheriff replied, "Your Honor, that is the only way it can be stopped."

MARTHA KAY.

Sworn to and subscribed before me this 3d day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

EXHIBIT M.

GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned, a Notary Public in and for said county Mrs. A. Shurman, who on oath says that on the last day of the trial of Leo M. Frank in above stated case, August 25th, 1913, she was present in the court room when the audience applauded. Judge Roan stated to the sheriff that the cheering and demonstrations would have to stop or the court room would have to be cleared. to which the sheriff replied "Your Honor, that is the only way it can be stopped."

MRS. A. SHURMAN.

Sworn to and subscribed before me this 3d day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

131 EXHIBIT N.

GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned, a Notary Public in and for said county, Mrs. A. Shurman, who on oath says that she is a resident of the city of Atlanta, living at No. 240 Central Avenue. Deponent says that on Monday morning, August 25th, 1913, the last day of the trial of the said Leo M. Frank, in the above stated cause, she was present in the court room in company with Miss Martha Kay, of No. 264 South Pryor Street, before time for court to open; that she saw the jury in said case enter said court room and take their places, and in a few moments Mr. Hugh M. Dorsey, the Solicitor-General of said court entered the room, just before he entered the room there was loud cheering in the street immediately outside the court house for "Dorsey," all of which was loud and long continued and plainly audible to any one in the court room; as Mr. Dorsey entered the court room there was also cheering in said court room. There was also applauding in the course of Mr. Dorsey's speech a couple of times on said date.

MRS. A. SHURMAN.

Sworn to and subscribed before me this 3d day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

EXHIBIT O.

GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned, a Notary Public in and for said county, Miss Martha Kay, who on oath says that she is a resident of the city of Atlanta, living at No. 264 South Pryor Street. Deponent says that on Monday morning, August 25th, 1913,

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the last day of the trial of the said Leo M. Frank in the above stated case, she was present in the court room in company with Mrs. A. Shurman of No. 240 Central Avenue, before time for court to open; that she saw the jury in said case enter said court room and take their places, and in a few moments Mr. Hugh M. Dorsey, the Solicitor-General of said court entered the room, just before he entered the room there was loud cheering in the street immediately outside the court house for "Dorsey," all of which was loud and long continued and plainly audible to anyone in the court room; as Mr. Dorsey entered the court room there was also cheering in said court room. There was also applauding in the course of Mr. Dorsey's speech a couple of times on said date.

MARTHA KAY.

Sworn to and subscribed before me this 3d day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

132 EXHIBIT P.

GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned a Notary Public in and for said county, Sampson Kay, who on oath says that he is a resident of the city of Atlanta, living at No. 264 South Pryor Street. Deponent further says that on Saturday evening, August 23rd, 1913, about 8 or 8:30 o'clock p. m. he saw the jury in the above entitled case walking along South Pryor Street with a deputy sheriff in front and another walking in the rear of said jury, said jury turning into South Pryor Street from East Fair Street, and thence up South Pryor Street to the Kimball House. Deponent followed the jury some 15 or 20 feet in the rear thereof, from E. Fair Street up South Pryor Street to near the corner of E. Mitchell and S. Pryor, when he passed ahead and waited on the corner of said streets until the jury had passed, and then continued to follow them up to the Kimball House. This deponent says that there were some six or seven men walking alongside the jurymen talking to them all the way from the corner of E. Fair and S. Pryor Streets, up to the Union Station just north of the corner of East Alabama and S. Pryor Street-, when the men left them, and the jury went on and entered the Kimball House through the Wall Street entrance.

SAMPSON KAY.

Sworn to and subscribed before me this 3d day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Georgia.

EXHIBIT Q.

STATE OF GEORGIA,
Fulton County:

Fulton Superior Court.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared Samuel A. Boorstin, who being duly sworn, on oath says: That on Friday evening, on the 22d day of August, 1913, at about 5 or 5:30 p. m., he was present at the court-room of Fulton Superior Court, Judge L. S. Roan, presiding, during the trial of the State versus Leo M. Frank; and, after adjournment, and when the jury had been taken from the court-room, and shortly thereafter, the Solicitor-General, Hugh M. Dorsey, had passed out of the court-room, there was a large crowd waiting outside, through which the jury passed, comprising, perhaps, no less than two or three thousand people; that this crowd did tumultuously and noisily applaud and cheer the Solicitor-General, and did congregate around the court-room on the outside, standing in great numbers, both on the street and on the sidewalks; that deponent, upon adjournment of court, was walking up Pryor Street from said court-room in a northerly direction, and when he reached Pryor and Alabama Streets, he saw two persons peering out of the third floor corner window in the Kimball House, looking in a southward direction at the large crowd congregated between the Kiser building and the court-house; that, as deponent continued walking northward and
133 reached the restaurant in the Union car shed, corner Pryor and Wall Streets, he still observed one of the figures in the jury-room peering southward, with both hands upon the window sill, whom he recognized as being Juror Smith, one of the jurors in the case of the State versus Leo M. Frank, then being on trial. The other person, who had his head through the window peering southward, had by this time stuck his head back into the room, and deponent could not tell who he was.

SAML. A. BOORSTIN.

Sworn to and subscribed before me this 3d day of October, 1913.

J. H. LEAVITT,
Notary Public, Fulton County, Georgia.

EXHIBIT R.

GEORGIA,
Fulton County:

Superior Court of Fulton County.

STATE OF GEORGIA
VS.
LEO FRANK.

Charged with Murder.

Personally appeared before the undersigned officer, W. B. Cate, who being duly sworn deposes and says; That on September the 1st, 1913, in the afternoon, I was standing at the corner of Alabama Street and S. Pryor Street, and had intended to go down S. Pryor Street to the Court House where the Frank trial was being conducted but was unable to get any closer to the Court House on account of the crowd that had gathered in the street, I was in about one block of the Court House. While I was standing at this place I heard a great deal of cheering and shouting, the street being full of men most of whom were making noise and cheering. I saw some one come out of the court house, whom I understood was Hugh Dorsey, the Solicitor, and he was picked up by some of the crowd and carried across the street on the shoulders of the men who had him. I could not see the man that was carried on the shoulders of the men very well but was told that it was Dorsey. There was at this time fully three thousand men gathered around the Court House, filling the streets on all sides of the court house. I only know Col. Dorsey by sight.

W. B. CATE.

Sworn and subscribed to before me this Sept. 16, 1913.
VIRLYN B. MOORE,
Notary Public, Fulton County, Ga.

EXHIBIT S.

GEORGIA,
Fulton County:

In Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Per-onally appeared J. H. G. Cochran, who being duly sworn depo es and says that he is a resident of Atlanta, Georgia, remembers the close of the trial of Leo M. Frank, and was present in front of the Court House in Atlanta, Georgia, on the day that the case closed and on the day that the jury returned the verdict of guilty in said case.

134 On the day aforesaid, to-wit:—that the jury returned the verdict, Mr. Cochran was standing in front of the Court House at the time the jury came out of the Court House to go to dinner; at just about the same time or near that time, and while the jury were in the vicinity of the Court House, Solicitor-General Hugh M. Dorsey came out of the Court House and went across the street to the Kiser building.

Deponent says that at the appearance of Solicitor Dorsey on the street coming from the Court House the crowd in the street, numbering between five hundred (500) and one thousand (1,000) people, to the best of this deponent's estimate, broke into loud and tumultuous cheering of the Solicitor, the jury being at the time near the Court House and proceeding up Pryor Street and being within sight of this Deponent at the time the cheering commenced, and that said cheering lasted the whole time that the Solicitor-General was crossing the street and until he had entered the Kiser building.

This Deponent knows that this cheering which took place in the presence of the jury, or in their hearing, and while they were on Pryor Street a short distance from the Court House, was cheering for the Solicitor, and he *re-* remembers the Solicitor's stopping at the entrance of the Kiser Building and taking off his hat and bowing to the crowds who were cheering; not only were the crowds cheering him but people in the windows of the Kiser Building were also cheering and waving their hands and handkerchiefs at the Solicitor; all of which was practically in the presence of the jury, at least within their hearing, before they proceeded up Pryor Street. Further deposing he says that on said day the jury took dinner at the German Café, on South Pryor Street, a distance of approximately one hundred fifty (150) to two hundred (200) feet from the Kiser Building, and that both outside of the Café and in the Café, the cheering of the Solicitor-General could be heard by any person.

J. H. G. COCHRAN.

Sworn to and subscribed before me this September 15th, 1913.
J. H. PORTER,
Notary Public, County of Fulton, State of Georgia.

EXHIBIT T.

GEORGIA,
Fulton County:

In Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared H. G. Williams, resident of Atlanta, Georgia, who deposes and says that on the day the Frank trial closed, and verdict of guilty was found by the jury against Leo M. Frank, accused of the murder of Mary Phagan, this Deponent was on South Pryor Street in front of the Court House.

This Deponent saw Solicitor Dorsey come from the Court House and cross the street to the Kiser Building in the presence of exceeding five hundred (500) people, who cheered his appearance at the entrance of the Court House with loud and continued cheering, which cheering continued until he had entered the Kiser Building across the street, and which cheering was acknowledged by Solicitor Dorsey at the entrance of the Kiser Building where he turned and raised his hat to the people who were cheering him.

135 Just preceding Solicitor Dorsey, the jury had come out of the Court House and had gone a short way up the street to the German Café for lunch; at the time of this cheering, which could be heard for a great distance on all sides of the Court House, the jury were in easy hearing distance of the noise during the whole time when the crowd was cheering Solicitor Dorsey.

Said demonstration over the Solicitor-General occupied not less than three (3) minutes, and perhaps not exceeding five (5) minutes, and took place on the last day of the trial, immediately after the jury had come from the Court House on their *way* to dinner. Further deposing, this Deponent says that practically the same demonstration took place on Saturday preceding the time hereinbefore specified, at the time when Solicitor Dorsey came from the Court House to go to his office and when the jury were proceeding from the Court House; said demonstration on Saturday being in the presence of the Solicitor and in the hearing of the jury, and being a demonstration over the Solicitor General.

H. G. WILLIAMS.

Sworn to and subscribed before me this September 15th, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, State of Georgia.

EXHIBIT U.

GEORGIA,
Fulton County:

Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared before the undersigned a Notary Public in and for said county, E. G. Pursley, who on oath says that he is a resident of the City of Atlanta, residing at No. 50 Ponders Ave., with office at No. 700 Temple Court.

Deponent says that on Friday noon, before the above stated case went to the jury on Monday, he was present in the court room where the trial of Leo M. Frank was being held; that when court adjourned and the jury had left and gone to lunch he came out of the court house and there was loud cheering for "Dorsey," which lasted for several minutes. Deponent walked from the Court House to his office on the seventh floor of the Temple Court Building, and when he reached his office some one asked deponent what all the racket or fuss was about down the street.

E. G. PURSLEY.

Sworn to and subscribed before me this 13th day of September, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton Co., Ga.

EXHIBIT V.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared Marano Benbenisty, who on oath says that he was standing outside of the court house on Friday afternoon, August 22nd, at about 12:20, and I saw the jury come out of the court room.

Soon after the jury came out of the court room, Mr. Dorsey
136 came out, and the crowd set up cheering and yelling "Hurrah for Dorsey." At the time of the yelling and cheering the jury was just crossing the street towards the Barbers' Supply Company, which is next to the Kiser Building. That in the opinion of the deponent there was about a thousand people crowding about the court room.

MARANO BENBENISTY.

Sworn to and subscribed before me this 29th day of August, 1913.
C. A. STOKES,
Notary Public, Fulton County, Ga.

EXHIBIT W.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared Isaac Hazan, who on oath says that he was standing outside of the court house on Friday afternoon, Aug. 22d, at about 12:20, and I saw the jury come out of the court room. Soon after the jury came out of the court room, Mr. Dorsey came out, and the crowd set up cheering and yelling "Hurrah," "Hurrah." At the time of the yelling and cheering the jury was just crossing the street towards the Barbers' Supply Company, which is next to the Kiser Building. That in the opinion of the deponent there was about a thousand people crowded about the court room.

Deponent further states that as the jury reached the other side of Pryor Street in front of the Barbers' Supply Company, deponent heard ten or fifteen men in front of the court house yelling toward the jury that unless they brought in a verdict of guilty, that they would kill the whole damn bunch; that in the opinion of your deponent, the jury must have heard them, because one of the jurors turned his face toward the yelling just when that occurred.

ISAAC J. HAZAN.

Sworn to and subscribed before me this 29th day of August, 1913.
C. A. STOKES,
Notary Public, Fulton County, Ga.

EXHIBIT X.

GEORGIA,
Fulton County:

Personally appeared John H. Shipp, who on oath says that on Friday, August 22, he was in room 301 of the Kiser Building, corner Hunter and So. Pryor Streets; that he saw the jury come out of the court house about six P. M.; that a few minutes after the jury came out of the court house, Mr. Dorsey appeared in the entrance, whereupon a great cheer arose from the people crowding in the streets and around the court house entrance; that at that time deponent saw the jury about fifty feet from the entrance of the court house, the jury at that time crossing diagonally toward the German Café; that in the opinion of deponent the yells and cheers could have been heard several blocks away; that the crowd yelled "Hurrah for Dorsey," and that the words were plainly audible.

137 Deponent further states that he was in room 301 of the Kiser Building, on Saturday, August 23; that he saw the jury emerge from the court house entrance at about one o'clock; that a few minutes after the jury came out, Mr. Dorsey came out and immediately a great crowd around the court house door set up a yell and cheer, saying "Hurrah for Dorsey," taking off their hats and throwing them in the air and otherwise exhibiting their enthusiasm; that at the time of the yelling, the jury was not in sight of deponent, but deponent is of the opinion that they were within easy hearing of the yelling and must have heard all that transpired.

Deponent further states that while he has been around the court house, during the progress of the trial, he has heard numerous threats of violence to the accused in case of an acquittal; that deponent knows that one of the persons making threats was armed, that he exhibited his weapon at time of making threat.

JOHN H. SHIPP.

Sworn to and subscribed before me this 26th day of August, 1913.

C. A. STOKES,
Notary Public, Fulton County, Ga.

EXHIBIT Y.

THE STATE OF GEORGIA
vs.
LEO M. FRANK.

Personally appeared B. S. Lipshitz, who on oath says that he was out in front of the Court House, mingling with the crowd, at about one P. M. on Saturday, August 23, immediately after court adjourned; that deponent saw the jury come out and about one or two minutes thereafter, Mr. Dorsey came out, whereupon there was great cheering and yelling by the crowd: that at the time the yelling and cheering took place, the jury could not have been more than one minute's walk away from the court house, and in the opinion of deponent, they could have heard the cheering and yelling.

Deponent further states that he was also present at the court house on Friday evening, August 22nd, when Mr. Dorsey left the court house, and heard the cheering and heard the crowd yelling "Hurrah."

B. S. LIPSHITZ.

Sworn to and subscribed before me this 26th day of August, 1913.

C. A. STOKES,
Notary Public, Fulton County, Ga.

EXHIBIT Z.

GEORGIA,
Fulton County:

Personally appeared Charles J. Moore, who on oath says that he is an attorney at law, occupying room 301 on the third floor of the Kiser Building, at the corner of Hunter and So. Pryor Streets; that on Friday, August 22, deponent was in his office and saw the jury come out of the court house entrance at about six P. M.; that soon after Mr. Dorsey appeared in the court house entrance and a great cheering and yelling occurred by the crowd immediately
138 opposite the entrance, and afterwards the crowd yelled "Hurrah for Dorsey," and the volume of the yells were so great that they could have been heard many blocks away; that they threw up their hats and gave other demonstrations; that at the time of the yelling the jury was just crossing the street toward the German Cafe, not fifty feet away from the entrance, and in the opinion of deponent must have heard the cheering and the words "Hurrah for Dorsey," because they could be plainly heard.

Deponent further states that he was in his office on Saturday, August 23, when the jury came out of the court house at about one o'clock, and he heard yelling and cheering when Mr. Dorsey appeared a few minutes afterwards. Deponent did not see the jury at the time of the yelling, but it occurred so soon after the jury came out of the court house that in the opinion of the deponent the jury must have heard the cheering and the words that were yelled.

Deponent further states that since the trial has been in progress he has heard several parties making threats of personal violence against the accused in the event of an acquittal; that these parties were loitering in and around the court house entrance and making threats that if the jury did not hang Frank; that they would pay the jury the compliment of sitting on the case and if the jury did not do its duty, they would; that deponent recalls the names of R. W. Milner, Richard Dutton; that Milner loitered continuously around the court house entrance and circulated among the crowd.

CHARLES J. MOORE.

Sworn to and subscribed before me this 26th day of August, 1913
C. A. STOKES,
Notary Public, Fulton County, Ga.

EXHIBIT AA.

GEORGIA,
Fulton County:

Personally appeared D. Rosinky, who on oath deposes and states that on Friday, August 22, and Saturday, August 23, he was standing near the corner of Hunter and South Pryor Street-, in the City of Atlanta, Georgia, and that when the Solicitor-General, H. M. Dor-

sey, came out of the old City Hall Building, now used as a court house, there was a loud and vociferous cheering by the assembled crowd; that members of the crowd took the Solicitor in their arms and carried him across the street to the Kiser Building.

D. ROSINKY.

Sworn to and subscribed before me this 26th day of August, 1913.

LEONARD HAAS,
Notary Public, Fulton County, Ga.

139 EXHIBIT BB.

GEORGIA,
Dougherty County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me personally appears Mack Farkas, who being duly sworn deposes and says that attached to this affidavit is a carbon copy of an order made by Sam Farkas, of Albany, Georgia, to Franklin Buggy Company, Incorporated, of Barnesville, Georgia.

Said order is marked Exhibit "A." Said order was taken by A. H. Henslee, a traveling salesman for said Franklin Buggy Company, in person; said order was taken on the date same bears date, to-wit: on July 8th, 1913.

This affidavit is made to be used on the motion for new trial in the above case. The name A. H. Henslee, on said order, is the handwriting and carbon copy of the signature of A. H. Henslee.

MACK FARKAS.

Sworn to and subscribed before me this October 21st, A. D. 1913.

L. L. FORD,
Notary Public, Dougherty County, Georgia.

EXHIBIT BB—(Continued).

GEORGIA,
Dougherty County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me personally appears B. W. Simon, who being duly sworn deposes and says that attached to this affidavit is a carbon copy of an order made by Sam Farkas, of Albany, Georgia, to Franklin Buggy Company, Incorporated, of Barnesville, Georgia.

Said order is marked Exhibit "A." Said order was taken by A. H. Henslee, a traveling salesman for said Franklin Buggy Company, in person; said order was taken on the date same bears date, to-wit: on July 8th, 1913.

This affidavit is made to be used on the motion for new trial in the above case. The name A. H. Henslee, on said order, is the handwriting and carbon copy of the signature of A. H. Henslee.

B. W. SIMON.

Sworn to and subscribed before me this October 21st, A. D. 1913.

L. L. FORD,
Notary Public, Dougherty County, Georgia.

140 EXHIBIT BB—(Continued).

GEORGIA,
Dougherty County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me personally appears Mack Farkas, who being duly sworn deposes and says that attached to this affidavit is a carbon copy of an order made by Sam Farkas, of Albany, Georgia, to Franklin Buggy Company, Incorporated, of Barnesville, Georgia.

Said order is marked Exhibit "A." Said order was taken by A. H. Henslee, a traveling salesman for said Franklin Buggy Company, in person; said order was taken on the date same bears date, to-wit: on July 8th, 1913.

This affidavit is made to be used on the motion for new trial in the above case. The name A. H. Henslee, on said order, is the handwriting and carbon copy of the signature of A. H. Henslee.

SAM FARKAS.

Sworn to and subscribed before me this October 21st, A. D. 1913.

L. L. FORD,
Notary Public, Dougherty County, Georgia.

EXHIBIT BB—(Continued).

Franklin Buggy Company, Inc.,
Manufacturers of the
"Improved Barnesville Buggy."

Barnesville, Georgia.

July 8, 1913.

When Ship—At Once.
How Ship, ——.

Ship to—Sam Farkas,
Albany, Ga.

Quantity	Cat. No.	BODY Width	BODY Style	GEAR Spring	GEAR Color	Axle Drop Arch	WHEELS Tread	WHEELS Height	Top	Trimmings	Stripe	Price Each
1	44	20	R	Side	Bla	Arch	¾	38/42	R	R	R	62.50 } Net
1	Set Rubbers for Job 44-V-⅞											15.00 }
1	44	22	R	Side	Car	Arch	¾	38/42	R	R	R	62.50
1	44	22	R	Side	Car	Arch	¾	38/42	R	R	R	62.50 } Net
1	Set Rubbers for Job 44-V-⅞											15.00 }
1	44	23	R	Side	Bla	Arch	¾	38/42	R	R	R	62.50

PAGE BOUND

TERMS.—Oct. 1st, 2.50 per cent. discount if paid in 30 days from date of invoice; if not discounted in 30 days buyer agrees to give note to cover the account net 90 days, from date of invoice, note to be made payable to any banker in Georgia. All goods F. O. B. Barnesville, Ga. No freight allowance. All notes due after 90 days from invoice to bear interest at 8 per cent. per annum.

All orders subject to manufacturers' contingencies. This order not subject to countermand after 5 days. No agreement considered unless same be written on face of this order.

The title of goods delivered under this contract to remain in the name of the sellers until they shall have received money for same, and upon failure to make such payments the sellers shall repossess themselves and take away such goods. Should time be taken under the terms of settlement of this contract by buyer and he should become insolvent or in default, sellers shall have the right to declare the whole amount, including all paper given, to be due and collectible. The acceptance of the goods implies the acceptance of this condition. All orders entered as regular 5 ft. Track unless other Track is specified. All prices F. O. B.

Barnesville, Ga.
Salesman—A. H. HENSLEE.

(Signature)

SAM FARKAS,
P'r B. W. SIMON, *B. K.*

ERTICAL IN BOOK

142 EXHIBIT CC.

GEORGIA,
Walton County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
VS.
LEO M. FRANK.

Before me, an officer authorized under the laws of Georgia to administer oaths, personally appear J. J. Nunnally and W. L. Ricker, of Monroe, Georgia, who, being duly sworn, depose and say on oath as follows:

That they have seen in the public prints that A. H. Henslee, one of the jurors in the Frank case, admits having made certain statements as to Frank's guilt of the murder of Mary Phagan, but says these statements were made after the trial of Leo M. Frank, and not before.

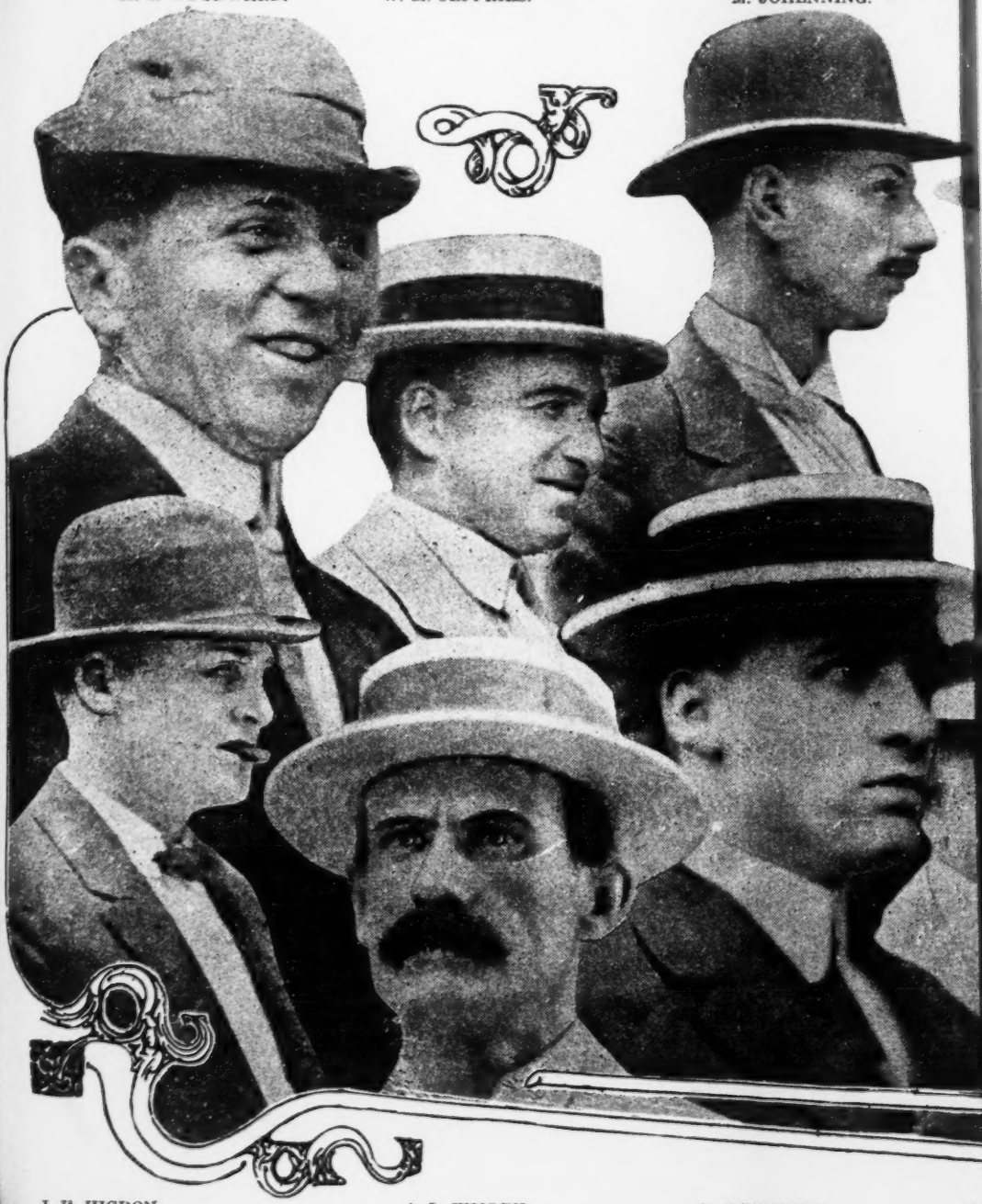
These deponents say that, so far as they know, the said Henslee has not been in Monroe, Georgia, since the trial of Leo M. Frank, and they reiterate the statement that all the statements made in their hearing by said Henslee, and testified about by these deponents on September 27th, 1913, were made before the commencement of the trial of Leo M. Frank for the murder of Mary Phagan on July 28th, 1913; to the best of these deponents' recollection, these statements were made in June, 1913, although as to the exact month these deponents say not.

J. J. NUNNALLY.
W. L. RICKER.

Sworn to and subscribed before me this October 10, A. D. 1913.

J. B. SHELNUTT,
Clerk Superior Court, Walton County, Georgia.

TWELVE JURORS WITH W



TWELVE JURORS WITH WHOM LEO M. FRANK'S FATE RESTS

EXHIBIT DD.

GEORGIA,
Fulton County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me personally appears Julian A. Lehman, who, being duly sworn, deposes and says on oath that he makes this affidavit for use in motion for new trial in above stated case.

Further deposing, he says on oath that he reiterates his statement heretofore made under oath that between the time of the murder of Mary Phagan, as reported by the newspapers, and the commencement of the trial of Leo M. Frank on July 28th, 1913, he, on two occasions, heard A. H. Henslee, a juror in said case, express himself firmly and positively as to the guilt of Leo M. Frank of the murder of Mary Phagan, in the language set forth in the affidavit heretofore made by this deponent and attached to the original motion for new trial in said case; one of said times was on or about June 20th, 1913, another time was early in the month of June, to the best of this deponent's recollection near June 2nd, but as to the exact date this deponent can not state.

JULIAN A. LEHMAN.

Sworn to and subscribed before me this 13th day of October, A. D. 1913.

J. H. PORTER,
Notary Public, Fulton County, Ga.

(Here follows picture of jury marked p. 142*a*.)

143 EXHIBIT EE.

In Fulton Superior Court.

GEORGIA,
Fulton County:

STATE OF GEORGIA
VS.
LEO M. FRANK.

Personally appeared Leon Harrison, who being duly sworn deposes and says that he makes this affidavit to be used on the motion for new trial in the above case.

Further deposing, he says that he is not acquainted with Leo M. Frank, is not related to him, and has never seen him to know him; he says on oath that he is not personally acquainted with A. H. Henslee but he knows that said Henslee is the party about whom he makes this affidavit.

Further deposing, he says that during the month of May, 1913, deponent was walking from Scherrer's lunch place on Peachtree Street toward Five Points, when he was attracted by a conversation between two men, one of whom was said A. H. Henslee; the same Henslee that served on the Frank jury and whose picture appeared in the Atlanta Georgian of August 26th, 1913, page 2, a clipping of which paper is hereto attached.

At the time, which was shortly after the Mary Phagan murder, almost everyone was discussing the murder, and this deponent was very much interested in the matter, as was everyone else; this deponent heard the men with Henslee say to Henslee, "I don't believe Frank committed that murder; if he did, he is one Jew in a million; not one Jew in a million would commit such a crime;" and to this statement said Henslee replied in deponent's hearing: "I believe he did kill the girl, and if by any chance I get on the jury that tries him, I'll try my best to have him convicted."

The above statement of Henslee was in reference to Frank's guilt of the murder of Mary Phagan.

LEON HARRISON.

Sworn to and subscribed before me this 8th day of October, 1913.

ROBT. C. PATTERSON,
Notary Public, Fulton County, Ga.

EXHIBIT FF.

GEORGIA,
Walton County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me, an officer authorized under the laws of Georgia to administer oaths, personally appears each of the undersigned persons, personally known to me; who, being duly sworn, depose and say on oath:

That they are personally acquainted with J. J. Nunnally and W. L. Ricker, and that said Nunnally and Ricker are each men of the highest personal and moral character and reputation, and that they are each entirely trustworthy, and worthy of belief, as to any statement made by them, or each of them.

R. C. KNIGHT,
Ex-Ordinary.
HAL G. NOWELL,
Solicitor City Court.
O. ROBERTS,
Attorney.
J. B. SHELNUTT,
Clerk Walton Sup. Ct.
ALONZO C. STONE,
Judge City Ct. of Monroe.

Sworn to and subscribed before me this October 10, 1913.

P. H. MICHAEL,
J. P., Walton County, Ga.

144 EXHIBIT GG.

GEORGIA,
Hancock County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
VS.
LEO M. FRANK.

Before me, an officer authorized under the laws of Georgia to administer oaths, personally appears each of the undersigned persons, personally known to me; who, being duly sworn, depose and say on oath:

That they are personally acquainted with Jno. M. Holmes, Shi Gray and S. M. Johnson; and that said Holmes, Gray and Johnson are each men of the highest personal and moral character and reputation, and that they are each entirely trustworthy, and worthy of belief, as to any statement made by them, or each of them.

T. B. HIGHTOWER,
Sheriff Han. Co., Ga.
W. H. BURWELL,
HENRY H. LITTLE,
Ordinary.
FRANK L. LITTLE,
Chairman Bd. of Education, Sparta.
T. M. HUNT,
H. D. CHAPMAN,
Tax Collector Han. Co.
THOS. F. FLEMING,
H. L. MIDDLEBROOKS,
Cashier First Nat. Bk.
G. W. RIVES,
Mayor of Sparta.
R. E. WHEELER,
Cashier Sparta Savings Bank.
D. E. WILEY,
Clerk Superior Court.
A. H. BIRDSONG,
Treasurer Hancock Co.
E. A. ROZIER,
V.-Pres. Bank of Sparta.
J. D. BURNETT,
Cor. Bk. of Sparta.

Sworn to and subscribed before me this October 8th, 1913.
J. D. LEWIS,
Notary Public, Hancock County, Georgia.

145 EXHIBIT HH.

GEORGIA,
Fulton County:

In the Superior Court of Fulton County, Ga.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me, an officer authorized under the laws of Georgia to administer oaths, personally appears each of the undersigned persons, personally known to me, who, being duly sworn, depose and say on oath:

That they are personally acquainted with Julian A. Lehman; and that said Lehman is a man of the highest personal and moral character and reputation, and that he is entirely trustworthy, and worthy of belief, as to any statement made by him.

W. F. UPSHAW.
S. E. PRUMAN.
HENRY B. KENNEDY.

Sworn to and subscribed before me this October 16th, A. D. 1913.
C. W. BURKE,
Notary Public, Fulton County, Georgia.

EXHIBIT HH—Continued.

GEORGIA,
Muscogee County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Before me, an officer authorized under the laws of Georgia to administer oaths, personally appears each of the undersigned persons, personally known to me, who, being duly sworn, depose and say on oath:

That they are personally acquainted with Julian A. Lehman; and that said Lehman is a man of the highest personal and moral character and reputation, and that he is entirely trustworthy, and worthy of belief, as to any statement made by him.

C. W. MIZELL.
R. P. SPENCER, JR.

Sworn to and subscribed before me this October 15th, A. D. 1913.
J. B. STEPHENS,
Notary Public, Muscogee County, Georgia.

EXHIBIT II.

GEORGIA,
Fulton County:

In Fulton Superior Court.

STATE OF GEORGIA
VS.
LEO M. FRANK.

Personally appeared the undersigned deponents who, being duly sworn, depose and say that they are personally acquainted with C. P. Stough, of Atlanta, Fulton County, Georgia, and that they know him to be a man of high personal character, entirely trustworthy, and absolutely worthy of belief as to any statement made by him, whether on oath or otherwise.

A. L. GUTHMAN.
L. P. STEPHENS.
A. H. VANDYKE.

Sworn to and subscribed before me this 22d day of October, 1913.
C. W. BURKE,
Notary Public, Fulton County, Georgia.

146 EXHIBIT JJ.

STATE OF GEORGIA,
County of Muscogee:

Personally appeared before me, an officer duly authorized by law to administer oaths, the undersigned who, being sworn, deposes and says that he was head clerk at the New Albany Hotel (Albany Hotel Company, proprietors), located at Albany, in said state and county, all during the months of June, July and August, 1913, and for several years prior to that time; and that attached hereto, marked "Exhibit A," is the register of guests at said hotel from the 20th day of June, 1913, to the 31st day of August, 1913; and that there was no other register of guests used at said hotel during the period above stated.

And deponent says further that on the third page of said register of guests, under date of July 8th, 1913 (Cont'd 7/8/13), on the second line from the top, is the signature of A. H. Henslee, address "Atlanta, U. S. A., assigned to room 79 in said hotel; and deponent says further that he was the clerk on duty at said hotel at the time

the said Henslee registered his said name on said register, and was a guest at said hotel during that day; and deponent says further that he is personally acquainted with the said Henslee.

And deponent says further that he is aware and has knowledge that this affidavit is to be used as evidence in the hearing of the motion for a new trial in the case of State of Georgia versus Leo M. Frank, which is now pending in the superior court of Fulton County, Georgia.

W. M. LITTLE.

Sworn to and subscribed before me this October 23rd, 1913.

H. K. GAMMON,
J. P., Muskogee County, Ga.

EXHIBIT KK.

STATE OF GEORGIA,
Fulton County:

Fulton Superior Court.

No. —.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Murder.

Personally appears Leo M. Frank, who on oath deposes and states that he is the defendant above named; that he did not know nor has he ever heard, until the end of his trial in the above stated case, that A. H. Henslee and Marcellus Johenning had any prejudice or bias against deponent nor that they or either of them had ever said or done anything indicating that they believed in deponent's guilt, or had any prejudice or bias against deponent.

LEO M. FRANK.

Sworn to and subscribed before me this 24th of October, 1913.

J. O. KNIGHT,
Notary Public, Fulton County, Georgia.

147 EXHIBIT LL.

GEORGIA,
Fulton County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

To the Honorable George L. Bell, Judge of the Fulton Superior Court:

This application is presented to the Court by Leo M. Frank, the defendant in the above stated case, and shows to the Court the following facts:

The above stated case of the State of Georgia vs. Leo M. Frank, indictment for murder, has been tried, a verdict found, and this defendant sentenced; and a motion for a new trial in said case is now pending before Honorable L. S. Roan, Judge of the Stone Mountain Circuit, and hearing set for October 4, 1913.

It is shown to this Court that there is a certain party in the City of Atlanta, one C. P. Stough, whose affidavit is desired by this defendant to be used as evidence on the motion for new trial, and that said C. P. Stough refuses to give said affidavit; and it is desired to take testimony of said C. P. Stough under Section 5918 of the Code of 1910 of the State of Georgia.

Wherefore, the premises considered, this application is made for the purpose of having this Court name a Commissioner to take said testimony and for the purpose of having subpœnas issued as provided in said section of the Code, requiring said C. P. Stough to be and appear before said Commissioner at a date and place named, to answer certain questions to be propounded to him by Counsel for said defendant.

This September 29th, 1913.

R. R. ARNOLD,
L. Z. ROSSER,
Defendant's Attorneys.

The foregoing application read and considered. It is ordered that Sig Teitlebaum act as commissioner in said case, in accordance with Section 5918 of the Code of Georgia of 1910.

This September 29th, 1913.

GEO. L. BELL,
Judge of Superior Court, Atlanta Circuit.

EXHIBIT LL (Continued).

GEORGIA,
Fulton County:

In Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Written Questions to be Propounded to C. P. Stough, a Witness for the Defendant, on the Motion for New Trial Pending in said Case, Set for Hearing October 4, 1913, *before Judge L. S. Roan, Judge of the Stone Mountain Circuit.*

1. Q. Do you know A. H. Henslee, who served on the jury in the above stated case at the trial commencing July 28, 1913?
A. Yes.
2. Q. How long have you known him?
A. About 6 or 7 years.
148 3. Q. During the time between the murder of Mary Phagan, as reported in the newspapers, to-wit: on April 26, 1913, and the commencement of the trial of the above case, what statements, if any, did you hear juror Henslee make in connection with Leo M. Frank, or as to who murdered Mary Phagan, or as to who was guilty of this murder; or as to how the trial of Leo M. Frank for this murder would terminate?
A. About the time that Conley was reported to have made a statement, I was coming into the city on a street car from the home of my daughter. Henslee was also on the car. I heard him say this, in reference to Leo M. Frank's guilt of the murder of Mary Phagan: "I think he is guilty and I would like to be in a position where I could help break his damned neck."
4. Q. How were these statements made?
A. This statement was most positive. He was as positive as I was, and I was as positive as I could be in what I said in the conversation.
5. Q. When and where was this?
A. On a College Park street car, coming into the city.
6. Q. What is your business?
A. Inspector for the Mason's Annuity.

C. P. STOUGH.

GEORGIA,
Fulton County:

Personally appeared C. P. Stough, who having been duly sworn made answer as above indicated and shown, to the foregoing written

questions 1-6 inclusive; said answers executed, sworn to and subscribed before me this September 29th, 1913.

SIG TEITLEBAUM,
Notary Public, Fulton County, Georgia,
and Commissioner to Take Testimony.

EXHIBIT MM.

GEORGIA,
Hancock County:

In Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

To the Honorable Clerk of the Superior Court of Hancock County, Ga.:

This application shows the following facts:

Heretofore, a verdict of guilty was returned in said case, judgment was passed by the Court, and a motion for new trial was filed in said case, which said motion for new trial is set for hearing on October 4th, 1913, before Judge L. S. Roan, Judge of the Stone Mountain Circuit.

It is shown that there are three parties who reside in Sparta, Hancock County, Georgia, to-wit: John M. Holmes, Esq., Shi Gray, Esq., and S. M. Johnson, Esq., whose affidavits are desired by the movant as evidence on said motion; and further that all three of said parties have refused t give said affidavits.

Wherefore, this application is made to the Clerk, as provided by Sections 5918-19 of the Civil Code of 1910, State of Georgia, that subpœnas may be issued addressed to each of said parties, requiring them to be and appear before J. W. Lewis, Esq., a notary public of said Hancock County, Georgia, and answer under oath such written questions as are hereto annexed and such further written questions as may be propounded upon the hearing, in lieu of making said affidavit.

R. R. ARNOLD,
L. Z. ROSSER,
Attorneys for Leo M. Frank, Movant.

149 EXHIBIT MM—(Continued).

GEORGIA,
Hancock County:

In Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Questions to be Propounded to Shi Gray, of Sparta, Hancock County, Georgia.

1. Q. Have you examined clipping from the Atlanta Georgian of August 26, 1913, hereto attached, showing a picture of the jury in the above-stated case, and showing a likeness of Juror A. H. Henslee?

A. Yes.

2. Q. Are you personally acquainted with A. H. Henslee?

A. Yes.

3. Q. Did you or not hear A. H. Henslee discussing the question of whether or not Leo M. Frank was guilty of the murder of Mary Phagan, between the death of said Mary Phagan and the commencement of the trial of Leo M. Frank charged with the murder of Mary Phagan?

A. Yes.

4. Q. To the best of your recollection what did he say in this conversation?

A. In a conversation in Walker & Holmes Insurance office, some one asked Henslee whether he, Henslee, thought Frank was guilty of the murder of Mary Phagan. Henslee answered in the affirmative. The answer given by Henslee was stated positively and firmly. The conversation lasted for about 20 minutes to half an hour. All of us were talking, Henslee and Mr. Holmes and Mr. Johnson, and others. The whole conversation at the time with Henslee was on the proposition as to whether or not Leo M. Frank was guilty of the murder of Mary Phagan.

5. Q. Where and when did this take place, and who else was present?

A. It was before the trial of Frank, and it was in the insurance office of Walker & Holmes.

6. Q. Did you not hear A. H. Henslee state, in Sparta, Ga., between the time of the death of Mary Phagan and the commencement of the trial of Leo M. Frank for the murder of Mary Phagan, that Leo M. Frank was guilty of the murder of Mary Phagan?

A. Yes.

7. Q. Did you not hear A. H. Henslee say that he believed Leo M. Frank was guilty of the murder of Mary Phagan, and further that he would bet one dollar or other sum, or would like to bet one

dollar or other sum, that he, the said A. H. Henslee, would be put on the jury to try Leo M. Frank for the murder of Mary Phagan?

A. I heard him say he was summoned as a juror in the same conversation already testified about.

8. Q. State in full what is your business occupation, or if more than one, what are your business occupations?

A. I am a dealer in live stock.

H. SHI GRAY.

GEORGIA,
Hancock County:

Before me personally appeared H. Shi Gray, who being first duly sworn true answers to make to the above and foregoing written questions, answered same as above set forth; said answers executed, sworn to, and subscribed before me this September 26, 1913.

J. W. LEWIS,
Notary Public, Hancock County, Georgia.

150 EXHIBIT MM—(Continued).

GEORGIA,
Hancock County:

In Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Questions to be Propounded to T. M. Johnson, of Sparta, Hancock County, Georgia.

1. Q. Have you examined clipping from the Atlanta Georgian of August 26, 1913, hereto attached, showing a picture of the jury in the above-stated case, and showing a likeness of Juror A. H. Henslee?

A. Yes.

2. Q. Are you personally acquainted with A. H. Henslee?

A. I know him by sight.

3. Q. Did you or not hear A. H. Henslee discussing the question of whether or not Leo M. Frank was guilty of the murder of Mary Phagan, between the death of said Mary Phagan and the commencement of the trial of Leo M. Frank charged with the murder of Mary Phagan?

A. Yes.

4. Q. To the best of your recollection what did he say in this conversation?

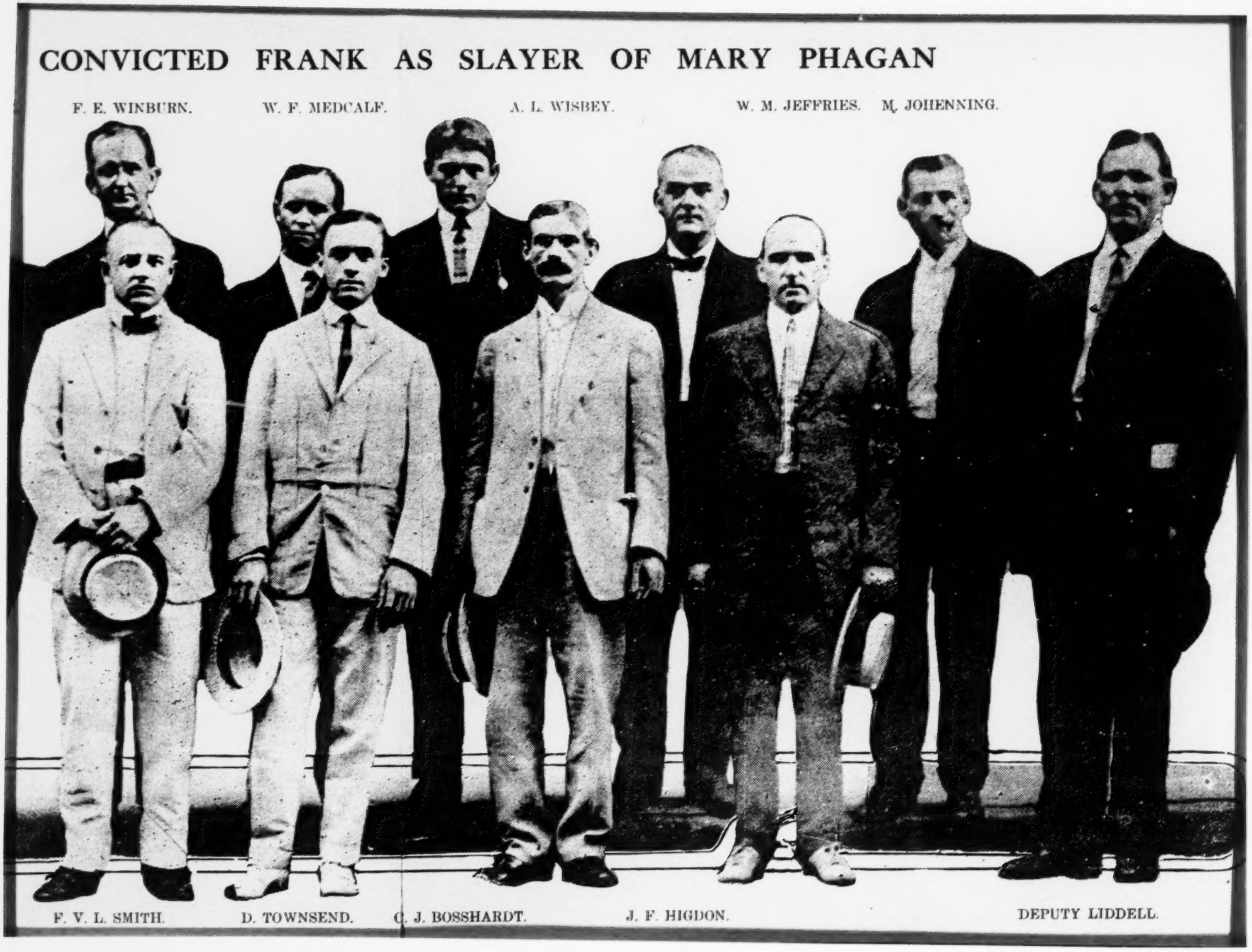
A. Several parties were talking. Some said they thought Leo M. Frank was guilty of the murder of Mary Phagan, others said they

JURY THAT CON

J. T. OSBURN. A. H. HENSLEE. F. E.

DEPUTY HUBER. M. S. WOODWARD. F. V. L. S.

CONVICTED FRANK AS SLAYER OF MARY PHAGAN



did not. Henslee stated his conviction that Frank was guilty of the murder of Mary Phagan. He did this firmly and positively.

5. Q. Where and when did this take place, and who else was present?

A. Walker & Holmes' office, about the last of June, 1913.

6. Q. Did you not hear A. H. Henslee state, in Sparta, Ga., between the time of the death of Mary Phagan and the commencement of the trial of Leo M. Frank for the murder of Mary Phagan, that Leo M. Frank was guilty of the murder of Mary Phagan?

A. Yes.

7. Q. Did you not hear A. H. Henslee say that he believed Leo M. Frank was guilty of the murder of Mary Phagan, and further that he would bet one dollar or other sum, or would like to bet one dollar or other sum, that he, the said A. H. Henslee, would be put on the jury to try Leo M. Frank for the murder of Mary Phagan?

A. He said he had been drawn as a juror and might have to serve.

8. Q. State in full what is your business occupation, or if more than one, what are your business occupations?

A. Work for Walker & Holmes.

T. M. JOHNSON.

GEORGIA,
Hancock County:

Before me personally appeared T. M. Johnson, who being first duly sworn true answers to make to the above and foregoing written questions, answered same as above set forth, said answers executed, sworn to and subscribed before me this September 26, 1913.

J. W. LEWIS,
Notary Public, Hancock County, Ga.

(Here follows picture of jury, marked p. 150a.)

151 EXHIBIT MM—(Continued).

GEORGIA,
Hancock County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
VS.
LEO M. FRANK.

Questions to be Propounded to John M. Holmes, of Sparta, Hancock County, Georgia.

1. Q. Have you examined clipping from the Atlanta Georgian of August 26, 1913, hereto attached, showing a picture of the jury in the above-stated case, and showing a likeness of Juror A. H. Henslee?

A. Yes.

2. Q. Are you personally acquainted with A. H. Henslee?

A. Yes.

3. Q. Did you or not hear A. H. Henslee discussing the question of whether or not Leo M. Frank was guilty of the murder of Mary Phagan, between the death of said Mary Phagan and the commencement of the trial of Leo M. Frank charged with the murder of Mary Phagan?

A. Yes.

4. Q. To the best of your recollection what did he say in this conversation?

A. Several men were in my office. Mr. Henslee was asked the question whether or not he believed Leo M. Frank was guilty of the murder of Mary Phagan. He stated that he did. He stated this positively and firmly.

5. Q. Where and when did this take place, and who else was present?

A. Walker & Holmes insurance office on the morning of June 27th, 1913.

6. Q. Did you not hear A. H. Henslee state, in Sparta, Ga., between the time of the death of Mary Phagan and the commencement of the trial of Leo M. Frank for the murder of Mary Phagan, that Leo M. Frank was guilty of the murder of Mary Phagan?

A. Yes.

7. Q. Did you not hear A. H. Henslee say that he believed Leo M. Frank was guilty of the murder of Mary Phagan, and further that he would bet one dollar or other sum, or would like to bet one dollar or other sum, that he, the said A. H. Henslee, would be put on the jury to try Leo M. Frank for the murder of Mary Phagan?

A. He stated that he had been summoned as a juror.

8. Q. State in full what is your business occupation, or if more than one, what are your business occupations?

A. Member of the firm of Walker & Holmes, real estate and insurance.

JOHN M. HOLMES.

GEORGIA,
Hancock County:

Before me personally John M. Holmes, who being first duly sworn true answers to make to the above and foregoing written questions, answered same as above set forth; said answers executed, sworn to, and subscribed before me this September 26, 1913.

J. W. LEWIS,
Notary Public, Hancock County, Ga.

152 EXHIBIT NN.

In Superior Court of Fulton County.

STATE OF GEORGIA
vs.
LEO M. FRANK.

GEORGIA,
Fulton County:

To the Honorable Clerk of the Superior Court of Walton County, Ga.

This application shows the following facts:

Heretofore, a verdict of guilty was returned in said case, judgment was passed by the Court, and a motion for new trial was filed in said case, which said motion for new trial is set for hearing on October 4th, 1913, before Judge L. S. Roan, Judge of the Stone Mountain Circuit.

It is shown that there are three parties who reside in Monroe, Walton County, Georgia, to-wit: J. J. Nunnally, Esq., Virgil Harris, Esq., and W. L. Ricker, Esq., whose affidavits are desired by the movant as evidence on said motion and further that all three of said parties have refused to give said affidavits.

Wherefore, this application is made to the clerk, as provided by Sections 5918-19 of the Civil Code of 1910, State of Georgia, that subpœnas may be issued addressed to each of said parties, requiring them to be and appear before Orrin Roberts or Clifford Walker, notary publics of said Walton County, Ga., and answer under oath such written questions as are hereto annexed and such further written questions as may be propounded upon the hearing, in lieu of making said affidavit.

R. R. ARNOLD,
L. Z. ROSSER,
Attorneys for Leo M. Frank, Movant.

GEORGIA,
Walton County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
VS.
LEO M. FRANK.

Written Questions to be Propounded to J. J. Nunnally, Esq., W. L. Ricker, Esq., Virgil Harris, Esq., and —— ——, Residence Monroe, Walton County, Georgia.

1. Q. Have you examined the attached clipping from the Atlanta Georgian of August 23, 1913, and particularly the likeness in said clipping of A. H. Henslee?

A. Yes, I have.

2. Q. Do you know A. H. Henslee?

A. I do.

3. Do you recall whether or not A. H. Henslee was in Monroe, Georgia, between the time of the murder of Mary Phagan, as reported in the papers, and the time of the commencement of the trial of Leo M. Frank for the murder of Mary Phagan, to-wit, July 28, 1913?

A. He was.

4. Q. Did you hear A. H. Henslee make any statements in connection with the guilt of Leo M. Frank of the murder of Mary Phagan, and if so, what were those statements?

A. I did. He talked for some time in the store of Nunnally & Harris, and stated that Leo M. Frank was guilty of the murder of Mary Phagan. He denounced Frank bitterly and vehem-
153 ently and made this statement about Frank in my hearing: "They are going to break that Jew's neck." This was stated most bitterly and positively.

5. Q. Did you hear A. H. Henslee, in Monroe, Georgia, between said dates, make any statements as to what he believed about the guilt of Leo M. Frank of the murder of Mary Phagan; if so, what were those statements?

A. Yes, he said that Frank was guilty.

6. Q. Did A. H. Henslee, in Monroe, Georgia, between said dates, in your presence, and hearing say he thought Leo M. Frank was guilty of the murder of Mary Phagan; if so, did he state it positively and firmly; how did he make the statement? Give his language as well as you recollect it; if you do not recollect his language, what was the tenor of it?

A. Yes; he was bitter.

7. Q. Did you hear A. H. Henslee, in Monroe, Georgia, between said dates, say anything about what the jury that tried Leo M. Frank for the murder of Mary Phagan would do if that jury did its duty; if so, what did he say, giving his language as nearly as you can recollect it, and if you can not recall the exact language, state the tenor and effect of said language.

8. Q. How long did A. H. Henslee discuss the guilt of Leo M. Frank in Monroe, Georgia, between said dates, and how many times did he repeat the statement that he thought Frank was guilty, in your hearing?

A. I was only present about 20 minutes. He was talking all the time I was there and stating that Frank was guilty of the murder of Mary Phagan.

9. Q. At the time you heard the statements above answered or referred to, who else was present and who else heard these statements, if you know?

A. J. J. Nunnally and some others whose names I do not now recall.

10. Q. State in full what is your business occupation, or occupations.

A. Dentist. Practicing about seven years. Am graduate of Atlanta Dental College.

W. L. RICKER.

GEORGIA,
Walton County:

Before me personally appeared W. L. Ricker, who being first duly sworn true answers to make to the above and foregoing questions, answered same as above set forth; said answer executed, sworn to and subscribed before me this September 27, 1913.

CLIFFORD WALKER,
Notary Public, Walton County, Ga.

154 EXHIBIT NN—(Continued).

GEORGIA,
Walton County:

In the Superior Court of Fulton County, Georgia.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Written Questions to be Propounded to J. J. Nunnally, Esq., W. L. Ricker, Esq., Virgil Harris, Esq., and —— ——, Residence Monroe, Walton County, Georgia.

1. Q. Have you examined the attached clipping from the Atlanta Georgian of August 23, 1913, and particularly the likeness in said clipping of A. H. Henslee?

A. Yes.

2. Q. Do you know A. H. Henslee?

A. Yes.

3. Q. Do you recall whether or not A. H. Henslee was in Monroe, Georgia, between the time of the murder of Mary Phagan, as reported

in the papers, and the time of the commencement of the trial of Leo M. Frank for the murder of Mary Phagan: to-wit—July 28, 1913.

A. He was.

4. Q. Did you hear A. H. Henslee make any statements in connection with the guilt of Leo M. Frank of the murder of Mary Phagan, and if so, what were those statements?

A. What impressed me was that Henslee was the most vehement in his expressions as to the guilt of Leo M. Frank of the murder of Mary Phagan, of any person I had heard talk about it. The Phagan murder was, at the time, the particular topic of conversation generally; a great many people were discussing it, and many men denouncing Frank as guilty, particularly traveling men. Henslee was the most bitter of any. For about two and one-half hours in my place of business Henslee argued Frank's guilt in the murder case; in talking about the outcome of the case, he made the statement, which to the best of my recollection was, that if the jury should turn Frank out, he (Frank) would not get out of Atlanta alive.

5. Q. Did you hear A. H. Henslee, in Monroe, Georgia, between said dates, make any statements as to what he believed about the guilt of Leo M. Frank of the murder of Mary Phagan; if so, what were those statements?

A. Yes, he believed him guilty.

6. Q. Did A. H. Henslee, in Monroe, Georgia, between said dates, in your presence, and hearing, say he thought Leo M. Frank was guilty of the murder of Mary Phagan; if so, did he state it positively and firmly; how did he make the statement? Give his language as well as you recollect it; if you do not recollect his language, what was the tenor of it?

A. He was very vehement as stated; there was no doubt from what he said that it was his conviction that Frank was guilty.

7. Q. Did you hear A. H. Henslee, in Monroe, Georgia, between said dates, say anything about what the jury that tried Leo M. Frank for the murder of Mary Phagan would do if that jury did its duty; if so,

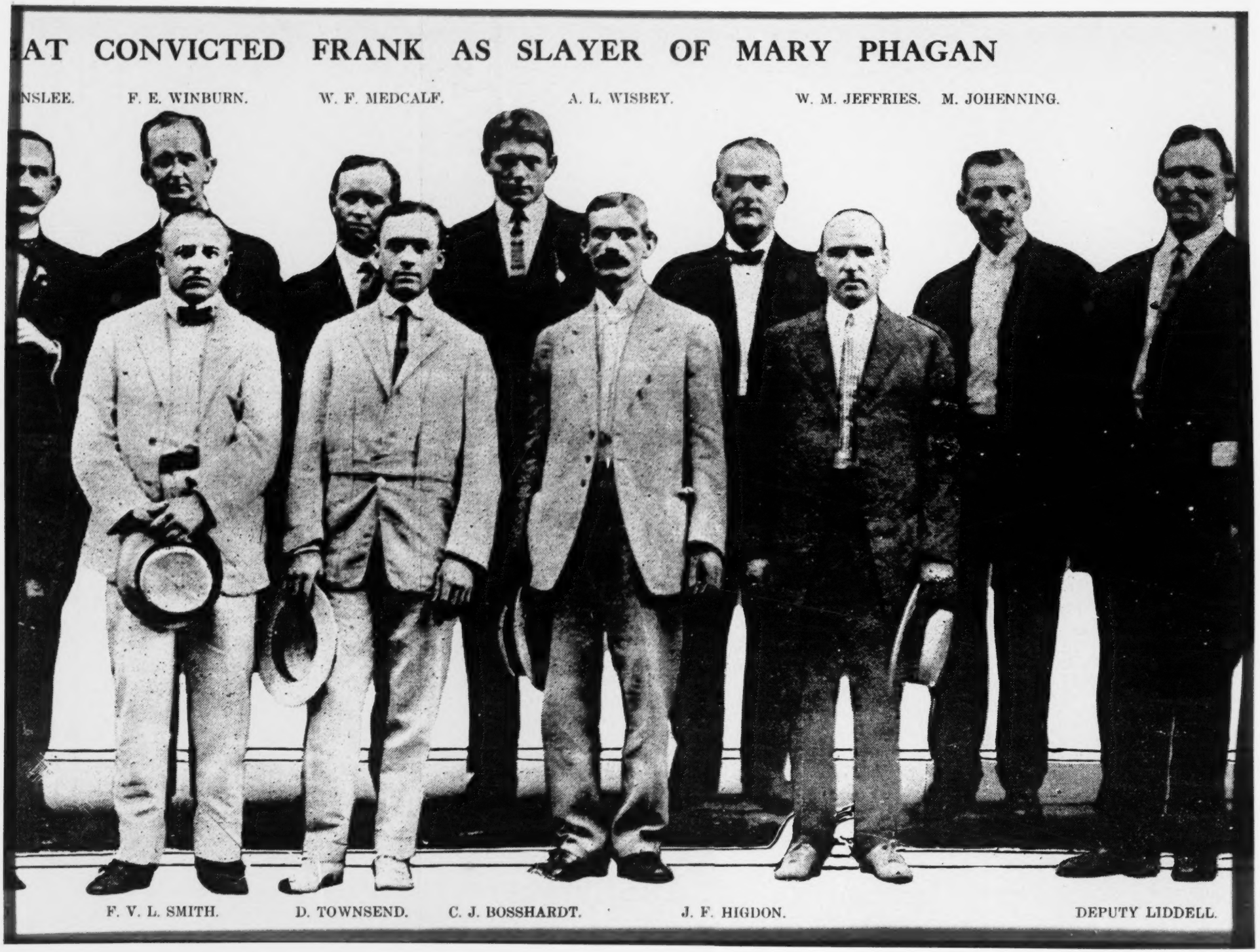
(Here follows picture of jury, marked page 154 *a*.)

JURY THAT

J. T. OSBURN. A. H. HENSLE

DEPUTY HUBER. M. S. WOODWARD.

AT CONVICTED FRANK AS SLAYER OF MARY PHAGAN



155 what did he say, giving his language as nearly as you can recollect it, and if you can not recall the exact language, state the tenor and effect of said language.

A. I only recall that, to the best of my recollection, he said that if the jury did turn Frank aloose, Frank would never get away alive.

8. Q. How long did A. H. Henslee discuss the guilt of Leo M. Frank in Monroe, Georgia, between said dates, and how many times did he repeat the statement that he thought Frank was guilty, in your hearing?

A. About two and one-half hours, according to my recollection. He made the statements repeatedly; it might have been only two hours.

9. Q. At the time you heard the statements above answered or referred to, who else was present and who else heard these statements, if you know?

A. Dr. W. L. Ricker, and at times during the period there were others, but their names I don't recall. My partner, Mr. Harris, was out of the city.

10. Q. State in full what is your business occupation, or occupations.

A. A member of the firm of Nunnally & Harris, composed of J. J. Nunnally and Virgil Harris, dealers in buggies, wagons, and live stock. Also vice-president W. H. Nunnally Co., general supplies and merchandise.

J. J. NUNNALLY.

GEORGIA,
Walton County:

Before me personally appeared J. J. Nunnally, who being first duly sworn true answers to make to the above and foregoing written questions, answered same as above set forth; said answers executed, sworn to and subscribed before me this September 27, 1913.

CLIFFORD WALKER,
Notary Public, Walton County, Ga.

The recitals of fact contained in the original motion for new trial, and in the one hundred and three grounds of the foregoing amended motion for new trial (the same being all the grounds of said original and all the grounds of said amended motion) are hereby approved as true, and the Court has identified all the exhibits and they are made part of said motion for new trial.

October 31, 1913.

L. S. ROAN,
J. S. C., St. Mt. Ct.

After considering the above and foregoing motion and amended motion and affidavits submitted by the State the motion for a new trial is hereby overruled and denied.

This October 31, 1913.

L. S. ROAN,
Judge Superior Court,
Stone Mountain Circuit, Presiding.

Recorded Writs M. G. page 796, 31st October, 1913.

JOHN H. JONES,
Deputy Clerk.

156 *Charge of the Court.*

Fulton Superior Court.

STATE OF GEORGIA
vs.
LEO M. FRANK.

Murder.

Trial: July 28 to Aug. 21, 1913.

GENTLEMEN OF THE JURY: This bill of indictment charges Leo M. Frank with the offense of murder. The charge is that Leo M. Frank, in this county, on the 26th day of April, of this year, with force and arms, did unlawfully and with malice aforethought kill and murder one Mary Phagan by then and there choking her, the said Mary Phagan, with a cord placed around her neck.

To this charge made by the bill of indictment found by the grand jury of this county recently empanelled Leo M. Frank, the defendant, files a plea of not guilty. The charge as made by the bill of indictment on the one hand and his plea of not guilty filed thereto form the issue, and you, gentlemen of the jury, have been selected, chosen and sworn to try the truth of this issue.

Leo M. Frank, the defendant, commences the trial with the presumption of innocence in his favor, and this presumption of innocence remains with him to shield him and protect him until the State shall overcome it and remove it by evidence offered to you, in your hearing and presence, sufficient in its strength and character to satisfy your minds beyond a reasonable doubt of his guilt of each and every material allegation made by the bill of indictment. I charge you, gentlemen, that all of the allegations of this indictment are material and it is necessary for the State to satisfy you of their truth by evidence that convinces your minds beyond a reasonable doubt of his guilt before you would be authorized to find a verdict of guilty. You are not compelled to find, from the evidence, his guilt beyond any doubt, but beyond a reasonable doubt, such a doubt as grows out of the evidence in the case, or for want of evidence, such a doubt as a reasonable and impartial mind would entertain about matters of the highest importance to himself after all reasonable efforts to ascertain the truth. This does not mean a fanciful doubt, one conjured up by the jury, but a reasonable doubt.

Gentlemen, this defendant is charged with murder. Murder is defined to be the unlawful killing of a human being, in the peace

of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied.

Express malice is that deliberate intention unlawfully to take away the life of a fellow-being, which is manifested by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and malignant heart.

There is no difference between express and implied malice except in the mode of arriving at the fact of its existence. The legal sense of the term "malice" is not confined to particular animosity to the deceased, but extends to an evil design in general. The popular idea of malice in its sense of revenge, hatred, ill will, has nothing to do with the subject. It is an intent to kill a human being in a case where the law would neither justify nor in any degree excuse the intention, if the killing should take place as intended. It is a deliberate intent unlawfully to take human life, whether it springs from hatred, ill will or revenge, ambition, avarice or other like passion. A man may form the intent to kill, do the killing instantly, and regret the deed as soon as done. Malice must exist at the time of the killing. It need not have existed any length of time previously.

157 When a homicide is proven, if it is proven to be the act of the defendant, the law presumes malice, and unless the evidence should relieve the slayer he may be found guilty of murder. The presumption of innocence is removed by proof of the killing by the defendant. When the killing is shown to be the act of the defendant, it is then on the defendant to justify or mitigate the homicide. The proof to do that may come from either side, either from the evidence offered by the State to make out its case, or from the evidence offered by the defendant or the defendant's statement.

Gentlemen of the jury, you are made by law the sole judges of the credibility of the witnesses and the weight of the testimony of each and every witness. It is for you to take this testimony as you have heard it, in connection with the defendant's statement, and arrive at what you believe to be the truth.

Gentlemen, the object of all legal investigation is the discovery of truth. That is the reason of you being selected, empanelled and sworn in this case—to discover what is the truth on this issue formed on this bill of indictment. Is Leo M. Frank guilty? Are you satisfied of that beyond a reasonable doubt from the evidence in this case? Or is his plea of not guilty the truth? The rules of evidence are framed with a view to this prominent end—seeking always for pure sources and the highest evidence.

Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts sustaining, by their consistency, the hypothesis claimed. To warrant a conviction on circumstantial evidence, the proven facts must not only be con-

sistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused.

The defendant has introduced testimony as to his good character. On this subject, I charge you that evidence of good character when offered by the defendant in a criminal case is always relevant and material, and should be considered by the jury, along with all the other evidence introduced, as one of the facts of the case. It should be considered by the jury, not merely where the balance of the testimony in the case makes it doubtful whether the defendant is guilty or not, but also where such evidence of good character may of itself generate a doubt as to the defendant's guilt. Good character is a substantial fact, like any other fact tending to establish the defendant's innocence, and ought to be so regarded by the jury. Like all other facts proved in the case, it should be weighed and estimated by the jury, for it may render that doubtful which would otherwise be clear. However, if the guilt of the accused is plainly proved to the satisfaction of the jury beyond a reasonable doubt, notwithstanding the proof of good character, it is their duty to convict. But the jury may consider the good character of the defendant, whether the rest of the testimony leaves the question of his guilt doubtful or not, and if a consideration of the proof of his good character, considered along with the evidence, creates a reasonable doubt in the minds of the jury as to the defendant's guilt, then it would be the duty of the jury to give the defendant the benefit of the doubt thus raised by his good character, and to acquit him. (Stephens' case, 81 Ga. 589.)

The word "character" as used in this connection, means that general reputation which he bore among the people who knew him prior to the time of the death of Mary Phagan. Therefore, when the witnesses by which a defendant seeks to prove his good character are put upon the stand, and testify that his character is good, the effect of the testimony is to say that the people who knew him spoke well of him, and that his general reputation was otherwise good.

When a defendant has put his character in issue, the State is
158 allowed to attack it by proving that his general reputation is not good, or by showing that the witnesses who have stated that his character is good, have untruly reported it. Hence, the Solicitor-General has been allowed to cross-examine the witnesses for the defense who were introduced to testify to his good character. In the cross examination of these witnesses, he was allowed to ask them if they had not heard of various acts of misconduct on the defendant's part. The Solicitor-General had the right to ask any questions along this line he pleased, in order thoroughly to sift the witnesses, and to see if anything derogatory to the defendant's reputation could be proved by them. The Court now wishes to caution you that, although the Solicitor-General was allowed to ask the defendant's character witnesses these questions as to their having heard of various acts of alleged misconduct on the defendant's part, the jury is not to consider this as evidence that the defendant has been guilty of any such misconduct as may have been indicated in the questions of the Solicitor-General, or any of them, unless the alleged

witnesses testify to it. Furthermore, where a man's character is put in evidence, and in the course of the investigation any specific act of misconduct is shown, this does not go before the jury for the purpose of showing affirmatively that his character is bad or that he is guilty of the offense with which he stands charged, but is to be considered by the jury only in determining the credibility and the degree of information possessed by those witnesses who have testified to his good character. (Henderson's case, 5 Ga. App. 495 (3)).

When the defendant has put his character in issue, the State is allowed to bring witnesses to prove that his general character is bad, and thereby to disprove the testimony of those who have stated that it is good. The jury is allowed to take this testimony, and have the right to consider it along with all the other evidence introduced on the subject of the general character of the defendant, and it is for the jury finally to determine from all the evidence whether his character was good or bad. But a defendant is not to be convicted of the crime with which he stands charged, even though, upon a consideration of all the evidence, as to his character, the jury believes that his character is bad, unless from all the other testimony in the case they believe he is guilty beyond a reasonable doubt.

You will, therefore, observe that this is the rule you will be guided by in determining the effect to be given to the evidence on the subject of the defendant's character: If, after considering all the evidence pro and con, on the subject of the defendant's character, you believe that prior to the time of Mary Phagan's death he bore a good reputation among those who knew him, that his general character was good, you will consider that as one of the facts in the case, and it may be sufficient to create a reasonable doubt of the defendant's guilt, if it so impress your minds and consciences, after considering it along with all the other evidence in the case; and if it does you should give the defendant the benefit of the doubt and acquit him. However, though you should believe his general character was good, still if, after giving due weight to it as one of the facts in the case, you believe from the evidence as a whole that he is guilty beyond a reasonable doubt, you would be authorized to convict him.

If you believe beyond a reasonable doubt from the evidence in this case that this defendant is guilty of murder, then you would be authorized in that event to say "We, the jury, find the defendant guilty." Should you go no further, gentlemen, and say nothing else in your verdict, the Court would have to sentence the defendant to the extreme penalty for murder, to-wit: to be hanged by the neck until he is dead. But should you see fit to do so, in the event you arrive at the conclusion and belief beyond a reasonable doubt
159 from the evidence that this defendant is guilty, then, gentlemen, you would be authorized in that event, if you saw fit to do so, to say: "We, the jury, find the defendant guilty, and we recommend that he be imprisoned in the penitentiary for life." In the event you should make such a verdict as that, then the Court, under

the law, would have to sentence the defendant to the penitentiary for life.

You have heard the defendant make his statement. He had the right to make it under the law. It is not made under oath and he is not subject to examination or cross-examination. It is with you as to how much of it you will believe, or how little of it. You may go to the extent, if you see fit, of believing it in preference to the sworn testimony in the case.

In the event, gentlemen, you have a reasonable doubt from the evidence, or the evidence and the statement together, or either as to the defendant's guilt as charged, then give the prisoner the benefit of that doubt, and acquit him; and in the event you do acquit him the form of your verdict would be: "We, the jury, find the defendant not guilty." As honest jurors do your utmost to reach the truth from the evidence and statement as you have heard it here, then let your verdict speak it.

Examined and approved as my charge in this case, Nov. 1, 1913.

(Signed) L. S. ROAN,
J. S. C., St. Mt. Ct.

160 *Petition for Appeal.*

In the Supreme Court of the United States, October Term, 1914.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Petition for Writ of Habeas Corpus.

The above named appellant, Leo M. Frank, conceiving himself aggrieved by the judgment made and entered on the 21st day of December, 1914, by the United States District Court for the Northern District of Georgia, in the above entitled cause, does hereby appeal from said judgment to the Supreme Court of the United States, for the reasons specified in the assignments of error, which are filed herewith, appellant alleging that there exists probable cause for said appeal, and prays that this appeal may be allowed, that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States, that the said judgment be reversed, and that such other and further proceedings may be had in the premises as may be just and proper.

LEO M. FRANK.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Attorneys for Appellant.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton:

Personally appeared Leo M. Frank, who on oath deposes and states that he is the appellant in the above entitled cause; that he verily believes that there exists probable cause for appeal and that this appeal is not made for the purpose of delay.

LEO M. FRANK.

Sworn to and subscribed before me this 22nd day of December, 1914.

[SEAL.] MONTEFIORE SELIG,
Notary Public, Fulton County, Ga.

Filed in Clerk's Office January 14, 1915. O. C. Fuller, Clerk.

161 STATE OF GEORGIA,
Fulton County:

I, Arnold Broyles, Clerk of the Superior Court of said County, which Court is a Court of record, do hereby certify that Montefiore Selig is a duly appointed Notary Public in and for said State and County, and that he was appointed on the 11 day of May 1911, and that his commission as such Notary expires with the 10th day of May, 1915 and that he resides in said County of Fulton.

I further certify that I am acquainted with the Signature of the said Montefiore Selig as such Notary Public, to the instrument hereto attached; that the same is genuine, and that, under the laws of Georgia, he is authorized to attest instruments for record, take acknowledgments and administer oaths.

In witness of all of which, I hereunto subscribe my name and affix the Seal of this Court, this the 22 day of Dec. 1914.

[SEAL OF THE COURT.] ARNOLD BROYLES,
Clerk of the Superior Court of Fulton County, Ga.

Revenue Stamp, Canceled.

162 *Assignments of Error.*

Supreme Court of the United States.

In the Matter of the Application of LEO M. FRANK, Appellant, for a Writ of Habeas Corpus, to be Directed to C. Wheeler Mangum, Sheriff of Fulton County, Georgia.

LEO M. FRANK, Appellant,
against
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia, Appellee.

Assignments of Error on Appeal.

Now comes Leo M. Frank, the appellant in the above entitled cause, and avers and shows that, in the record and proceedings in said cause, the District Court of the United States for the Northern District of Georgia erred to the grievous injury and wrong of the appellant in said cause, and to his prejudice and against his rights, in the following particulars:

First. The said District Court of the United States erred in holding, that the appellant's application and the exhibits and records therein referred to did not make a case wherein the said Court could properly allow the issuance of the writ of habeas corpus prayed for.

163 Second. The said District Court of the United States erred in holding, that the denial by the Supreme Court of the United States and by the several Justices thereof of appellant's application for a writ of error to the Supreme Court of Georgia, to review the judgment of that court affirming the judgment of the Superior Court of Fulton County, Georgia, denying the appellant's motion to set aside the verdict rendered in the said court convicting him of murder, deprived this appellant of his right to the issuance of a writ of habeas corpus as prayed for.

Third. The said District Court of the United States erred in holding, that it could not entertain the petition of the appellant for the issuance of a writ of habeas corpus herein because it would be the exercise by said Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the laws of the United States.

Fourth. The said District Court of the United States erred in holding, that by entertaining the appellant's petition for a writ of habeas corpus it would do so in the face of alleged decisions of two Justices of this Court, and of this Court, that no Federal question remained for consideration, or now exists in this cause.

Fifth. The said District Court of the United States erred in holding, that no question was made concerning the jurisdiction of the Superior Court of Fulton County, Georgia, in trying the indictment wherein the appellant was charged with the crime of murder.

164 Sixth. The said District Court of the United States erred in holding, that the appellant is not entitled to the writ of habeas corpus or the relief prayed for, and that his application for the same should be denied.

Seventh. The said District Court of the United States erred in refusing to hold, that the Superior Court of Fulton County, Georgia, lost jurisdiction over the appellant on his trial for murder in said court, because of his involuntary absence from the court at the time of the rendition of the verdict against him and of the polling and discharge of the jury, said trial having thereby become a nullity, and the proceedings of said court in receiving said verdict and polling the jury and discharging it, were coram non judice and devoid of due process of law.

Eighth. The said District Court of the United States erred in refusing to hold, that the judgment pronounced against the appellant in the Superior Court of Fulton County, Georgia, whereby he was sentenced to death and under which he is now in the custody of C. Wheeler Mangum, Sheriff of Fulton County, Georgia, was a nullity, and all subsequent proceedings thereto are nullities, because at the time when said judgment was pronounced the said Superior Court of Fulton County, Georgia, had lost jurisdiction over the appellant and of this cause.

Ninth. The said District Court of the United States erred in refusing to hold, that the reception by the Superior Court of Fulton County, Georgia, on the appellant's trial for murder in said court, in his absence, of the verdict convicting him of the crime of murder, tended to deprive him of his life and liberty without due

165 process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Tenth. The said District Court of the United States erred in refusing to hold, that the appellant had the right to be present at every stage of his trial in the Superior Court of Fulton County, Georgia, including the reception of the verdict against him, the polling of the jury and the discharge of the jury, and that this right was a fundamental right essential to due process of law.

Eleventh. The said District Court of the United States erred in refusing to hold, that the involuntary absence of the appellant at the time of the reception of the verdict on his trial in the Superior Court of Fulton County, Georgia, and the polling of the jury, deprived him of an opportunity to be heard, which constituted an essential prerequisite to due process of law.

Twelfth. The said District Court of the United States erred in refusing to hold, that the appellant's opportunity to be heard on his

trial in the Superior Court of Fulton County, Georgia, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Thirteenth. The said District Court of the United States erred in refusing to hold, that the appellant's right to be present during the entire trial, including the time of the rendition of the verdict against him in the said Superior Court of Fulton County, Georgia,
was one which neither he nor his counsel could waive nor ab-
166 jure.

Fourteenth. The said District Court of the United States erred in refusing to hold, that the appellant's counsel having had no express or implied authorization from him to waive his presence at the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, and it being in any event beyond his constitutional power to give them such authority, their consent to the reception of the verdict in his absence was a nullity.

Fifteenth. The said District Court of the United States erred in refusing to hold, that since neither the appellant nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any ratification by him or acquiescence on his part in any action taken by his counsel.

Sixteenth. The said District Court of the United States erred in refusing to hold, that the appellant's involuntary absence at the reception of the verdict rendered against him in the Superior Court of Fulton County, Georgia, constituting as it did an infraction of due process of law, incapable of being waived directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, his failure to raise the jurisdictional question on his motion for a new trial did not deprive him of his constitutional right to atttack as a nullity the verdict rendered against him and the judgment based thereon.

Seventeenth. The said District Court of the United States
167 erred in refusing to hold, that the appellant's trial in the Superior Court of Fulton County, Georgia, did not proceed in accordance with the orderly process of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to him and whose conduct intimidated the court and jury and unduly influenced them and neutralized and over-powered their judicial functions, and because for that reason he was deprived of due process of law and of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Eighteenth. The said District Court of the United States erred in refusing to hold, that the decision of the Supreme Court of Georgia, which determined that the appellant's motion to set aside the verdict rendered against him in the Superior Court of Fulton County, Georgia, on the ground of his absence at the time of the rendition of said verdict, was not an available remedy to attack such verdict but that the objection should have been raised on the motion for a new trial, deprived the appellant of a substantial right given to him

by the law in force at the time to which his alleged guilt related and at the time of the reception of the verdict against him and of the presentation and decision of the motion for a new trial made by him, and took from him a right which at all of said times was vital to the protection of his life and liberty, and constituted the passing of an ex post facto law in violation of the prohibition contained in Article I, Section 10, of the Constitution of the United States, and was illegal and void.

168 Nineteenth. The said District Court of the United States erred in refusing to hold, that the judgment of the Supreme Court of Georgia, rendered on November 14, 1914, deprived him of due process of law and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States, because the Court thereby in effect declared, that in order to avail himself of his aforesaid constitutional rights, to wit, the assertion of his right to due process of law and to the equal protection of the laws, he would be compelled to subject himself to a second jeopardy, thus depriving him of his aforesaid constitutional rights except on the illegal condition of the surrender by him of the right secured to all persons charged with criminal offenses in the State of Georgia under paragraph 8, section 1, Article I, of the Constitution of said State.

Dated, December 23, 1914.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Petitioner's and Appellant's Counsel.

Filed in Clerk's Office this January 11th, 1915.

O. C. FULLER,
Clerk U. S. District Court, Northern District of Georgia.

169 *Opinion of Justice Lamar.*

In re LEO FRANK. Habeas Corpus.

Leo Frank's recent application for a writ of error was denied by me on the ground that no Federal question was involved in the ruling of the Supreme Court of Georgia that his Motion to Set Aside the verdict finding him guilty of murder had been filed too late. This petition presents a wholly different question since it is an application for the allowance of an appeal from the judgment of a Federal Court on a record which presents a purely Federal question, irrespective of regulations governing State practice.

Frank's petition for the writ of habeas corpus, addressed to the Judge of the United States District Court for the Northern District of Georgia, alleges that on his trial for murder in the Superior Court of Fulton County, Georgia, public feeling against him was so great that the presiding judge advised his counsel not to have him present in the court room when the verdict was returned, and that his involuntary absence, under such circumstances, when the verdict was received, deprived him of a hearing to which he was entitled under the Constitution and rendered his conviction void. He avers that

his Motion for a New Trial was overruled and he then moved to Set Aside the verdict as being void for want of jurisdiction; That in passing on that Motion the State Supreme Court held that while he had the Constitutional right to be present when the verdict against him was returned into court, yet such verdict could not be attacked, by a Motion to Set Aside, after the expiration of the trial term and after his Motion for a New Trial had been finally refused. He alleges that his attempt to have that judgment reviewed in the Supreme Court of the United States failed because, though a Federal question was raised in the record, the decision of the Supreme Court of Georgia was based on a matter of State practice.

He thereafter filed this petition for a writ of habeas corpus in which he claims that the right to be present at the rendition of the verdict was jurisdictional and that on habeas corpus he is entitled to a hearing on the question as to whether he had waived or could waive his constitutional right to be present when the verdict of guilty was returned into court.

The District Judge heard no evidence as to the truth of the allegations, but refused the writ on the ground that the facts therein stated did not entitle Frank to the benefit of that remedy. He declined to give the certificate of probable cause and this application for that certificate and for the allowance of an appeal was then made to me as the Justice assigned to the Fifth Circuit.

Under the Act of 1908 the application for the certificate is not to be determined by any views which may be held as to the effect of the final judgment of the State Supreme Court refusing a New Trial, but by considering whether the nature of the constitutional right asserted in the absence of any decision expressly foreclosing the right to an appeal, leaves the matter so far unsettled as to constitute probable cause justifying the allowance of the appeal.

The Supreme Court of the United States has never determined whether, on a trial for murder in a State court, the due process clause of the Federal Constitution guarantees the defendant a right to be present when the verdict is rendered.

Neither has it decided the effect of a final judgment refusing a New Trial in a case where the defendant did not make the fact of his absence when the verdict was returned a ground of the Motion, nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal Constitution.

Nor has it passed upon the effect of its own refusal to grant a writ of error in a case where an alleged jurisdictional question was presented in a Motion filed at a time not authorized by the practice of the State where the trial took place. Such questions are all involved in the present case, and since they have never been settled by any authoritative ruling by the full court, it cannot be said that there is such a want of probable cause as to warrant the refusal of an appeal. That being true, the Act of Congress requires that the certificate should be given and the appeal allowed.

Dec. 28, 1914. J. R. LAMAR,

Associate Justice Supreme Court of the United States.

Filed in Clerk's Office January 11th, 1915.

O. C. FULLER,
Clerk U. S. District Court, Northern District of Georgia.

172 *Order Allowing Appeal and Certificate of Probable Cause.*

Supreme Court of the United States, October Term, 1914.

No. —.

LEO M. FRANK
vs.
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

On consideration of the petition of Leo M. Frank for an appeal from the order of the District Court of the United States for the Northern District of Georgia, denying the prayer of the petitioner for the issuance of a writ of habeas corpus herein,

It is ordered that said appeal be, and the same is hereby, granted upon the petitioner giving bond in the sum of Three hundred dollars ($300.00), conditioned according to law, and in pursuance of the Act of Congress of March 10th, 1908, Chapter 76, 35 Statutes at Large, page 40, I do hereby certify that there is probable cause for the allowance of said appeal.

(Signed) J. R. LAMAR,
Associate Justice of the Supreme Court of the United States.

Washington, D. C., December 28, 1914.

Filed in Clerk's Office Jany. 11th, 1915.

O. C. FULLER,
Clerk U. S. District Court, Northern District of Georgia.

173 *Appeal Bond.*

Know all men by these Presents, That we, Leo M. Frank, as principal, and Montefiore Selig of Atlanta, Georgia, as Sureties, are held and firmly bound unto C. Wheeler Mangum, Sheriff of Fulton County, Georgia, in the full and just sum of Three Hundred, ($300.00) dollars, to be paid to the said C. Wheeler Mangum, Sheriff of Fulton County, Georgia, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of January, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately as a District Court of the United States for the Northern District of Georgia in a suit depending in said Court entitled Ex Parte Leo M. Frank, on petition for writ of habeas corpus, an order was entered against the said Leo M. Frank and the said Leo M. Frank having obtained an order allowing an appeal and filed a copy thereof in the Clerk's Office of the said court to reverse the order in the aforesaid suit, and a citation directed to the said C. Wheeler Mangum, Sheriff of Fulton County, Georgia, citing and

admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Leo M. Frank shall prosecute said plea to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

LEO M. FRANK. [SEAL.]
MONTEFIORE SELIG. [SEAL.]

Sealed and delivered in the presence of I. F. Sterne.
[SEAL.] HERBERT KAISER,
Notary Public, Fulton County, Georgia.

[On margin:] Notary Public, Fulton County, Georgia. My Commission expires Nov. 25th, 1916.

Approved by
J. R. LAMAR,
Associate Justice of the Supreme Court of the United States.

STATE OF GEORGIA,
Fulton County:

I, Arnold Broyles, Clerk of the Superior Court of said County, which Court is a Court of record, do hereby certify that Herbert Kaiser is a duly appointed Notary Public in and for said State and County, and that he was appointed on the 25th day of November 1912, and that his commission as such Notary expires with the 25th day of November 1916 and that he resides in said County of Fulton.

I further certify that I am acquainted with the Signature of the said Herbert Kaiser as such Notary Public, to the instrument hereto attached; that the same is genuine, and that, under the laws of Georgia, he is authorized to attest instruments for record, take acknowledgements and administer oaths.

In witness of all of which I hereunto subscribe my name and affix the seal of this Court this the 4th day of Jan'y 1915.

[SEAL.] ARNOLD BROYLES,
Clerk of the Superior Court of Fulton County, Ga.

Ten cent revenue stamp canceled.

174 *Petition for Writ of Habeas Corpus.*

LEO M. FRANK
v.
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

Appeal.

GEORGIA,
Fulton County:

Personally appeared before me the undersigned officer Montefiore Selig who being first duly sworn deposes and says that he is the

owner in his own right of property worth at least three hundred dollars in excess of the amount of all exemptions allowed him by law.

MONTIFIORE SELIG.

Sworn to and subscribed before me this 4th day of January, 1915.

[Seal M. P. Cook, Notary Public, Fulton County, Ga.]

M. P. COOK,
Notary Public, Fulton County, Georgia.

Filed in Clerk's Office Jan'y 11th, 1915.

O. C. FULLER,
Clerk U. S. District Court,
Northern District of Georgia.

STATE OF GEORGIA,
Fulton County:

I, Arnold Broyles, Clerk of the Superior Court of said County, which Court is a Court of record, do hereby certify that M. P. Cook is a duly appointed Notary Public in and for said State and County, and that she was appointed on the 7th day of Dec. 1912, and that her commission as such Notary expires with the 6th day of December 1916 and that she resides in said County of Fulton.

I further certify that I am acquainted with the Signature of the said M. P. Cook as such Notary Public, to the instrument hereto attached; that the same is genuine, and that, under the laws of Georgia, she is authorized to attest instruments for record, take acknowledgements and administer oaths.

In witness of all of which I hereunto subscribe my name and affix the Seal of this Court this the 4th day of Jan'y 1915.

[SEAL.] ARNOLD BROYLES,
Clerk of the Superior Court of Fulton County, Ga.

Ten cent revenue stamp cancelled.

175 UNITED STATES OF AMERICA, *ss:*

To C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Georgia, wherein Leo M. Frank is appellant and you are appellee to show cause, if any there be, why the order rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph R. Lamar, Associate Justice of the Supreme Court of the United States, this sixth day of January, in the year of our Lord one thousand nine hundred and fifteen.

J. R. LAMAR,
Associate Justice of the
Supreme Court of the United States.

Filed in Clerk's Office, January 11", 1915.
O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

176 GEORGIA,
Fulton County:

On this 9th day of January, in the year of our Lord one thousand nine hundred and fifteen, personally appeared before me, the subscriber, Henry A. Alexander and makes oath that he delivered a true copy of the within citation to C. Wheeler Mangum, Sheriff of Fulton County, Georgia on January 9th 1915.
HENRY A. ALEXANDER.

Sworn to and subscribed the 9th day of January, A. D. 1915.
[Seal G. H. Brodnax, Notary Public, Fulton County, Ga.]
G. H. BRODNAX,
Notary Public, Fulton County, Ga.

My Commission expires Nov. 29, 1916.

Service of the foregoing citation is hereby acknowledged—this Jan. 9, 1914.
WARREN GRICE,
Attorney General of Georgia,
Representing Appellee.

177 Supreme Court of the United States, October Term, 1914.

No. —.

LEO M. FRANK
v.
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

Præcipe.

To the Clerk of the District Court for the Northern District of Georgia:

The appellant in the above stated cause, Leo M. Frank, indicates as the portions of the record to be incorporated in the transcript of the record on said appeal the entire record in said cause.

Appellant further files herewith an acknowledgement of service of a copy of this præcipe on the counsel of the appellee, C. Wheeler Mangum, Sheriff of Fulton County. Georgia.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Attorneys for Appellant.

178 Supreme Court of the United States, October Term, 1914.

No. —.

LEO M. FRANK
v.
C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

GEORGIA,
Fulton County:

The appellee in the above stated cause, C. Wheeler Mangum, Sheriff of Fulton County, Georgia, hereby acknowledges, through his counsel, service of a copy of the foregoing præcipe.

WARREN GRICE,
Attorney General of Georgia.

This 11th day of January, 1915.

Filed in Clerk's Office January 11th, 1915.
O. C. FULLER,
Clerk U. S. District Court,
Northern District of Georgia.

179 In the District Court of the United States for the Northern Division of the Northern District of Georgia.

I, Olin C. Fuller, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached printing and writing is a true, full, correct and complete copy of the record and all proceedings had and Assignments of Error filed, in the matter of the Application of Leo M. Frank, Appellant, for a writ of habeas corpus to be directed to C. Wheeler Mangum, Sheriff of Fulton County, Ga. Leo M. Frank Appellant, against C. Wheeler Mangum, Sheriff of Fulton County, Georgia, Appellee, as the same appear of record and on file in this office. I further certify that the original Citation with Acknowledgement of Service Thereon is attached hereto in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court, at the City of Atlanta, Georgia, this the 15th day of January, A. D. 1915.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk U. S. District Court for the
Northern District of Georgia.

Endorsed on cover: File No. 24,519. N. Georgia D. C. U. S. Term No. 775. Leo M. Frank, appellant, vs. C. Wheeler Mangum, Sheriff of Fulton County, Georgia. Filed January 18th, 1915. File No. 24,519.

FILED
JAN 25 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT,

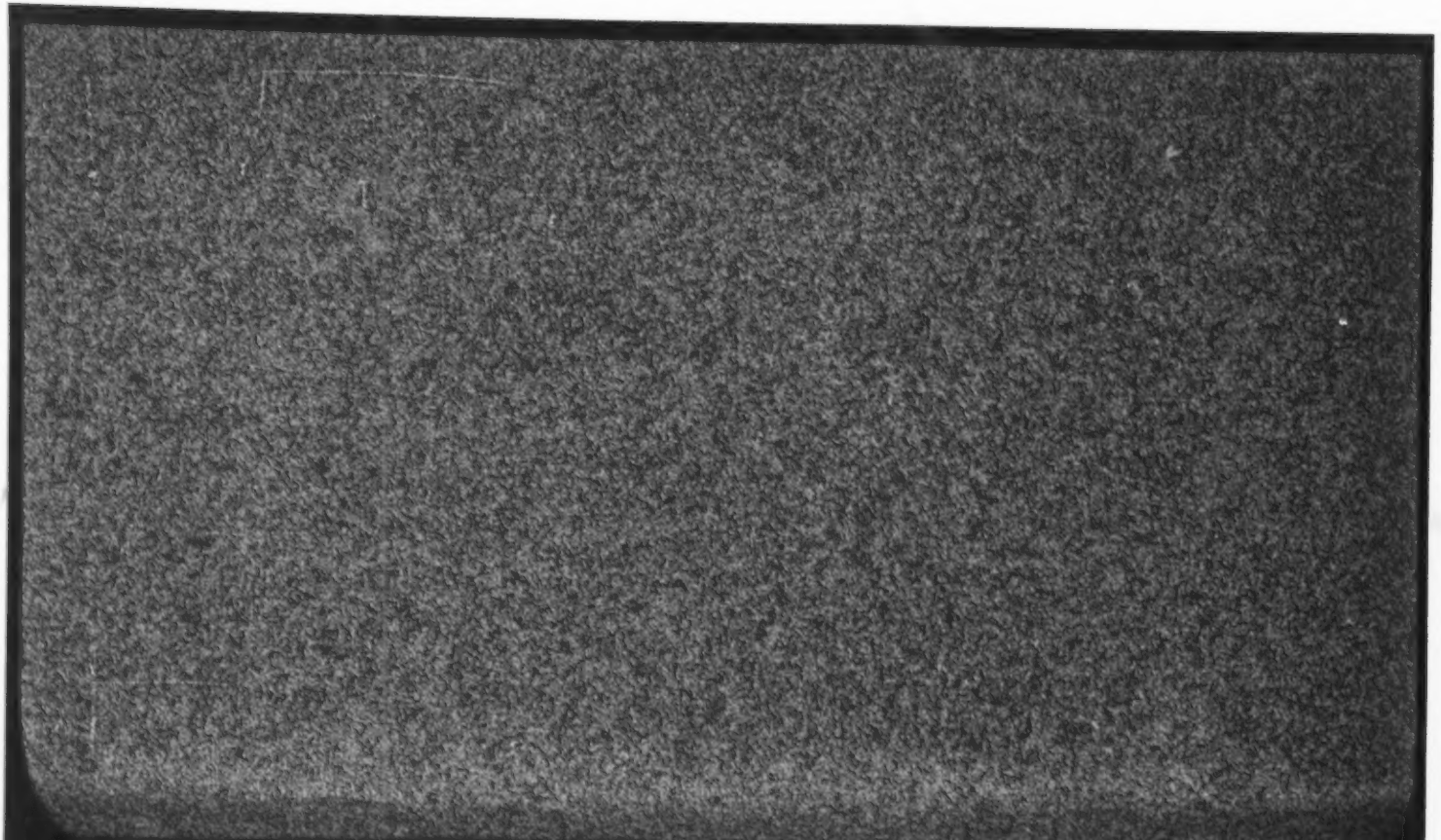
vs.

O. WHEELER MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

MOTION TO ADVANCE.

LOUIS MARSHALL,
HENRY C. PEPPLER,
HENRY A. ALEXANDER,
FULTON BRYLAWSKI,
Attorneys for Appellant.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK, APPELLANT,

vs.

C. WHEELER MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA, APPELLEE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Leo M. Frank, appellant, and respectfully shows that on the first day of January, 1915, an appeal was duly allowed to this court, in the above-entitled cause, from an order of the United States District Court for the Northern District of Georgia, which dismissed the appellant's petition for the issuance of a writ of *habeas corpus*, he being, as alleged, unlawfully detained by the appellee under a judgment of the Superior Court of Fulton County, Georgia, which convicted him of the crime of murder and sentenced him to be executed; the appellant's contention being that the said judgment was void in that the Superior Court of Fulton County, Georgia, had lost jurisdiction over him at the time of the rendition of the verdict of the jury which convicted him of the said crime of murder.

On January 19, 1915, this honorable court granted an order staying proceedings on the said judgment pending this appeal, and the appellant is now actually incarcerated in the jail of Fulton County, and is there deprived of his liberty.

Subsequent to the allowance of this appeal, counsel for the appellant conferred with Warren Grice, Attorney General of the State of Georgia, who represents the appellee, for the purpose of speeding the argument of said appeal, subject to the approval of this court, on the ground that the interests of the appellant and of the public demand its speedy hearing and a determination thereof.

This cause was duly docketed by the clerk of this court on January 18, 1915, and the Attorney General of the State of Georgia has consented that a motion to advance this cause may be made, and has waived the service of notice of motion upon him, but states that on account of the pressure of his engagements in other courts, he is unwilling to have the hearing of this cause set earlier than during the week beginning February 22, 1915. The appellant is willing to have this cause set for hearing on any day and is desirous that the earliest practicable day be fixed for the hearing of said appeal.

Wherefore, the appellant prays that this cause be advanced and set for argument on such day as this honorable court may deem proper.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
FULTON BRYLAWSKI,
Attorneys for Appellant.

Office Supreme Court, U. S.
FILED
FEB 20 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 775

LEO M. FRANK,

Appellant,

against

C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

APPELLANT'S ARGUMENT.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Appellant's Counsel.

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POINT III. The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one

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POINT IV. It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel.....106-108

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POINT VI. Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned, can be raised, then, we contend that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an *ex post facto* law.....110-113

POINT VII. It follows from the propositions thus far discussed that appellant's application for a writ of *habeas corpus* is squarely based on the contention that, when the ver-

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dict against him was received and judgment was rendered against him the Court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making *habeas corpus* the proper remedy to test the validity of his detention thereunder 114-131

POINT VIII. The appellant had, before applying for a writ of *habeas corpus,* exhausted all of his remedies in the State courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this Court has pointed out as controlling in like cases....131-154

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK,
Appellant,

against

C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

Appellant's Argument.

Leo M. Frank appeals from a judgment rendered on December 21, 1914, by the United States District Court for the Northern District of Georgia, Hon. William T. Newman, United States District Judge, presiding, which denied his petition for a writ of *habeas corpus*. An appeal to this court was allowed by Mr. Justice Lamar, who certified that there was probable cause for such allowance. (*Rec. pp. 16; 229-231.*)

The appellant, in his petition, alleged that he was unjustly and unlawfully deprived of his liberty, and unlawfully imprisoned and detained in the jail of Fulton County, Georgia, by C.

Wheeler Mangum, the Sheriff of the County and ex-officio jailer thereof; that his imprisonment was in violation of his rights as a citizen of the United States, guaranteed by that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law. The petition showed that the sole claim of authority by virtue of which he was restrained of his liberty is, that on May 24, 1913, he was indicted by the grand jury of Fulton County, Georgia, on the charge of having murdered Mary Phagan; that thereafter in the Superior Court of Fulton County, Hon. L. S. Roan, a Judge of that court, presiding, he was arraigned and tried on the indictment, and on August 25, 1913, the jury empanelled to try him returned a verdict of guilty, upon which the judgment of the court was thereafter rendered, and he was, on August 26, 1913, sentenced to be hung, and thereafter remanded to the custody of the respondent as sheriff and ex-officio jailer, and has continued in such custody ever since awaiting the execution. (*Rec. p. 1*).

The petition shows that, at the time of the rendition of the verdict, the entry of judgment thereon, and the pronouncement of the sentence of death against the appellant, the Superior Court of Fulton County, in which he was tried, had lost jurisdiction over him and over the trial of the indictment, and that all proceedings upon the trial, including the reception of the verdict, the rendition of the judgment, and the pronouncement of the sentence of death and his commitment to the jail of Fulton County and into the custody of the respondent, were without due pro-

cess of law, and in all respects null, void and of no effect, and he charges that his imprisonment, confinement and detention are in all respects illegal, and in violation of his constitutional rights. (*Rec. pp. 1, 2.*)

The facts which occasioned such loss of jurisdiction and by reason of which he was deprived of due process of law and of the equal protection of the laws, are stated by the appellant in his petition as follows (*Rec. pp. 2 to 5*):

THE HOSTILE ATMOSPHERE SURROUNDING THE TRIAL.

"My trial in the Superior Court of Fulton County, State of Georgia, before Hon. L. S. Roan and a jury, began on July 28, 1913, in the Court House at Atlanta, Georgia, and continued until August 25, 1913. The court room in which the trial took place was on the ground floor of the Court House. The windows of the court room were open during the progress of the trial, and looked out on Pryor Street, a public street of Atlanta. An open alley ran from Pryor Street along the side of the Court House, and there were windows looking into this alley from the court room. The noises from the street were thus conveyed to the court room, and the proceedings in the court room could be heard in the street and alley. Considerable public excitement prevailed during the trial, and it was apparent to the Court that public sentiment seemed to be greatly against me. The court room was constantly crowded, and considerable crowds gathered in the street and alley, and the noises which emanated from them could be heard in the court room. These crowds were boisterous. Several times during the trial, the crowd in the court room and outside of the Court House applauded, in a manner audible both to the Court and jury, whenever the State scored a point. The crowds outside

cheered, shouted and hurrahed, while the crowd within the court room evidenced its feelings by applause and other demonstrations. Practically all of the seats in the court room were occupied, both within and without the bar. The aisles at each end of the court room were packed with spectators. The jury, in going to and from the court room, in the morning, at noon and in the evening, were dependent upon the passageways made for them by the officers of the court. The bar of the court room itself was so crowded as to leave but a small space for occupancy by the counsel. The jury box, which was occupied by the jury, was enclosed by the crowd sitting and standing in such close proximity to it that the whispers to the crowd could be heard during a part of the trial."

DEMONSTRATIONS IN THE PRESENCE OF THE JURY AND THEIR EFFECT.

"On Saturday, August 23, 1913, during the argument of Solicitor General Dorsey to the jury, Reuben R. Arnold, Esq., one of my counsel, made an objection to such argument, and the crowd laughed at him. While Mr. Arnold, my counsel, made a motion for a mistrial, and was engaged in taking evidence in support thereof before the Court, the crowd applauded a witness who testified that he did not believe that the jury heard the applause of the crowd on the previous day, since at that time the jury was in the jury room about twenty feet distant."

"On Saturday, August 23, 1913, while the Court was considering whether or not the trial should proceed on that evening and to what hour the trial should be extended, the excitement in and without the court room was so apparent as to cause apprehension in the mind of the Court as to whether the trial could be safely continued on that day, and before deciding upon an adjournment, the presiding Judge, Hon. L. S. Roan, while upon the bench, and in the presence of the jury, conferred

with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, who were well known to the jury. The public press of Atlanta, apprehending danger if the trial continued on that day, united in a request to the Court, that the proceedings should not continue on Saturday evening. The trial was thereupon continued until the morning of Monday, August 25, 1913."

"It was evident on that morning, that the public excitement had not subsided, and that it was as intense, as it had been on the Saturday previous. Excited crowds were present as before, both within and outside of the court room. When the Solicitor General entered the court room, he was greeted by applause by the large crowd present, who stamped their feet and clapped their hands, the jury being then in its room, about twenty feet distant."

THE CIRCUMSTANCES RESULTING IN APPELLANTS' ABSENCE FROM THE COURT-ROOM.

"During the entire trial I was in the custody of C. Wheeler Mangum, the Sheriff of Fulton County and ex-officio jailer, and was actually incarcerated in the jail, except on such occasions when I was brought into the court room by the Sheriff or one of his deputies. I was unable to be present at the trial, except when permitted by the Court and conducted there by the said Sheriff or his deputies.

"On the morning of Monday, August 25, 1913, shortly before Hon. L. S. Roan, Presiding Judge, began his charge to the jury, he privately conversed with Messrs. L. Z. Rosser and Reuben R. Arnold, two of my counsel, in the jury room of the Court House, and referred to the probable danger of violence that I would incur if I were present when the verdict was rendered and the verdict should be one of acquittal or of disagreement. After he had thus expressed himself, he requested my counsel to agree that I need not be present at

the time when the verdict was rendered and the jury polled. In the same conversation the Judge expressed his opinion to counsel, that even they might be in danger of violence should they be present at the reception of the verdict. Under these circumstances they agreed with the Judge, that neither I nor they should be present at the rendition of the verdict."

"I knew nothing of this conversation, nor of any agreement made by my said counsel with the Judge, until after the rendition of the verdict and sentence of death had been pronounced."

"Pursuant to this conversation, I was not brought into court at the time of the rendition of the verdict, and I was not present when the verdict was received and the jury was discharged, nor was any of my counsel present when the verdict was received and the jury discharged."

"I did not give to my counsel nor to any one else, authority to waive my right to be present at the reception of the verdict, or to agree that I should not be present at that time, nor were they in any way authorized or empowered to waive my right so to be present; nor did I authorize my counsel, or any of them, to be absent from the court room at the reception of the verdict, or to agree that they or any of them might be absent at that time. My counsel were induced to make the aforesaid agreement as to my absence and their absence at the reception of the verdict, solely because of the statement made to them by the Presiding Judge, and their belief that if I were present at the time of the reception of the verdict and it should be one of acquittal or of disagreement, it might subject me and them to serious bodily harm, and even to the loss of life."

"Besides Messrs. Rosser and Arnold, I had as counsel Morris Brandon, Esq., and Herbert J. Haas, Esq. Neither of them was present when the verdict was received and the jury discharged. Neither the conversation with Judge Roan, nor the

purport thereof, was communicated to Messrs. Brandon and Haas, nor did they have any knowledge thereof, until after sentence of death had been pronounced against me."

MOB ACTION AFTER THE CHARGE AND AT THE RECEPTION OF THE VERDICT.

"After the jury had been finally charged by the Court and the case had been submitted to it, when Mr. Dorsey, the Solicitor General, left the court room, a large crowd on the outside of the Court House and in the streets, greeted him with loud and boisterous applause, clapping their hands and yelling 'Hurrah for Dorsey,' placed him upon their shoulders, and carried him across the street into a building, where his office is located. The crowd did not wholly disperse during the interval between the submission of the case to the jury and the return of the jury to the court room with its verdict, but during the entire period a large crowd was gathered in the immediate vicinity of the Court House. When it was announced that the jury had agreed upon a verdict, a signal was given from within the court room to the crowd on the outside to that effect, and the crowd outside raised a mighty shout of approval, and cheered while the polling of the jury proceeded. Before more than one juror had been polled, the applause was so loud and the noise was so great, that the further polling of the jury had to be stopped, so that order might be restored, and the noise and cheering from without was such, that it was difficult for the Presiding Judge to hear the responses of the jurors as they were being polled, although he was only ten feet distant from the jury."

"All of this occurred during my involuntary absence from the court room, I being at the time in the custody of the Sheriff of Fulton County and incarcerated in the jail of said County, my absence from the court room, and that of my counsel, hav-

ing been requested by the Court because of the fear of the Court that violence might be done to me and my counsel had I or my said counsel been in court at the time of the rendition of the verdict."

"Thereafter, on August 26, 1913, I was sentenced to death by said Superior Court of Fulton County, Georgia, and remanded to the custody of C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, said Court being at that time without jurisdiction over me or over the cause in which said verdict was rendered, because of my involuntary absence from the court at the time of the rendition of the verdict and of the polling and discharge of the jury, said trial having thereby become a nullity and the proceedings of Hon. L. Roan, Presiding Judge, in receiving said verdict and polling the jury and discharging it, being *coram non judice* and devoid of due process of law."

PROCEEDINGS IN THE STATE COURT AFTER THE VERDICT.

The petition then states the subsequent history of the case as follows (*Rec. pp. 5 and 6*):

On August 26, 1913, Frank's counsel filed a motion for a new trial. This was denied on October 21, 1913, Hon. L. S. Roan, the Presiding Judge, on denying the motion, saying, that the jury had found the defendant guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of the appellant's guilt; that with all the thought he had put on the case he was not fully convinced that he was innocent or guilty, but that he did not have to be convinced; that there was no room to doubt

that the jury was, and that he felt it his duty to order that the motion for a new trial be overruled.

The cause was then taken on writ of error to the Supreme Court of Georgia, where, on February 17, 1914, a judgment was rendered affirming the judgment of conviction of the Superior Court of Fulton County and denying appellant's motion for a new trial. (*Frank* v. *State, 141 Ga. 243.*)

On April 16, 1914, the appellant filed his motion in the Superior Court of Fulton County, Georgia, to set aside the verdict rendered against him, on the grounds above stated, namely, that he was involuntarily absent from the court when the verdict against him was received and the jury discharged, in violation of his constitutional rights, and that he was deprived of a fair and impartial trial, of due process of law, and of the equal protection of the laws; that he did not waive the right to be present at the reception of the verdict, and did not authorize the waiver of such right on his behalf by his counsel or by any other person, nor consent that he should not be present at the rendition of the verdict, or that his counsel should be absent at the time; that any agreement made by his counsel in his absence and without his knowledge or consent, that he should not be present at the time of the rendition of the verdict, was of no legal force or effect, and that by reason of the premises the verdict rendered against him was a nullity.

The State of Georgia, by the Solicitor General, demurred to this petition, and on June 6, 1914, it was dismissed on the demurrer, and judgment was rendered against the appellant.

The judgment was then taken by writ of error to the Supreme Court of Georgia, where, on No-

vember 14, 1914, a judgment was rendered by that court which affirmed the judgment of the Superior Court of Fulton County sustaining the State's demurrer and dismissing the appellant's motion to set aside the verdict.

The grounds of this judgment are to be found in the opinion, *Rec. pp. 22-39.* They are, in substance, (1) that a person accused of crime has a right to be present at the time of the rendition of the verdict against him, but such right is an incident of the trial; (2) that his absence at the time of the rendition of the verdict was a mere irregularity that can be waived by him; (3) that under the laws of Georgia a motion for a new trial is an available remedy by which to attack a verdict rendered in the absence of one accused of crime; (4) that after the making of a motion for a new trial and the affirmance of judgment denying the same by the Supreme Court, a motion made thereafter to set aside the verdict on the ground that the accused had been absent from the court room when the verdict was rendered, comes too late.

Under previous decisions of the Supreme Court of Georgia, and under the practice which had prevailed throughout the State prior to the rendering of the opinion just referred to, the proper procedure for attacking as a nullity a verdict rendered in the absence of a prisoner had been held to be a motion to set aside the verdict. A motion for a new trial had been treated as not being the proper remedy. The former decisions of the Supreme Court of Georgia were unanimous decisions, and, under the laws of that State, had the force of a statute until reversed by a full bench, after argument, on a request for review granted by the court.

No previous decision of the Supreme Court of Georgia, nor of the Court of Appeals of that State, these courts being its only appellate courts and its highest courts, had ever declared that a motion to set aside as a nullity a verdict rendered in a prisoner's absence was not a valid remedy to attack such verdict. The decision of the Supreme Court of Georgia in appellant's case, which determined that a motion for a new trial was an available remedy in such a case, and denied appellant's right to move to set aside the verdict on the grounds hereinbefore stated, was the first decision of this kind ever rendered by that court or by the Court of Appeals of Georgia.

The appellant contends that this decision had the effect of depriving him of a substantial right given to him by the laws in force at the time to which his alleged guilt related, and at the time of the reception of the verdict against him and the presentation and decision of the motion for a new trial, and took from him a right which at all of these times was vital to the protection of his life and liberty, and constituted the passing of an *ex post facto* law, in violation of the prohibition contained in Article I, Section 10, of the Constitution of the United States, and is illegal and void; and likewise deprived him of due process of law and of the equal protection of the laws.

EFFORTS TO REVIEW DECISION BY WRIT OF ERROR.

On November 18, 1914, appellant applied to the Supreme Court of Georgia for a writ of error to this Court, for a review of the judgment which had denied his motion to set aside the verdict, and on the same day this application was denied.

On November 21, 1914, the appellant applied to Mr. Justice Lamar, the Justice of this Court assigned to the Fifth Circuit, which includes the State of Georgia, for a writ of error to review the judgment. This application was denied on November 23, 1914. A similar application was made to Mr. Justice Holmes, who denied the same on November 25, 1914; and an application having thereafter been made to Mr. Chief Justice White, on reference thereof to the full bench of this Court it was denied on December 7, 1914, without opinion.

Having thus exhausted all of his remedies in the Courts of Georgia, and by applications for writ of error to this Court, to review the judgment denying his motion to set aside the verdict rendered against him, and having been afforded no adequate and efficient means for asserting and obtaining his rights under the Constitution under a writ of error, the appellant filed his petition in the United States District Court for the Northern District of Georgia, to be discharged from custody because of the nullity of the verdict received in his absence, and of the judgment rendered thereon and his commitment thereunder. In substantiation of his contention that the Superior Court of Fulton County, Georgia, wherein he was convicted of the crime of murder, had lost jurisdiction over him, he averred:

APPELLANT'S GROUNDS FOR ASSERTING THE NULLITY OF VERDICT AND JUDGMENT.

"(1) The reception, in my absence, of the verdict convicting me of the crime of murder, tended to deprive me of my life and liberty without due

process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

(2) I had the right to be present at every stage of my trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

(3) My involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived me of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

(4) This opportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

(5) My right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither I nor my counsel could waive or abjure.

(6) My counsel having had no express or implied authority from me to waive my presence at the time of the rendition of the verdict, and it being in any event beyond my constitutional power to give them such authority, their consent to the reception of the verdict in my absence was a nullity.

(7) Since neither I nor my counsel could expressly waive my right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by me or acquiescence on my part in any action taken by my counsel.

(8) My involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before

or after the rendition of the verdict, the failure to raise the jurisdictional question on my motion for a new trial, did not deprive me of my constitutional right to attack as a nullity the verdict rendered against me and the judgment based thereon.

(9) My trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to me, and whose conduct, intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and, for that reason also, I was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, the protection of which I expressly invoke."

GROUNDS OF DENIAL OF RELIEF BY JUDGE NEWMAN.

Judge Newman, on denying the application for a writ of *habeas corpus*, rendered an opinion, in which, after stating the various applications that had been made to this Court for the allowance of a writ of error to the Supreme Court of Georgia to review its action on the motion to set aside the verdict rendered against the appellant, said:

"How this cou[illegible] could be justified in issuing this writ when this r[illegible]ord is disclosed to it, I am unable to see. If [illegible]his writ should issue, notwithstanding all that [illegible]as occurred, and this applicant should be brought into court, the only thing the court here could do would be to hear evidence and determine whether this applicant had been denied the equal protection of the laws and due process of law, and consequently should be discharged. It seems to me that this would be the exercise by this court of supervisory power over the action of the State courts in a manner not warranted by

the Constitution or the laws of the United States. Also the court would be considering the matter as proper for hearing and decision here in the face of the decisions of two Justices of the Supreme Court —indeed of the entire court—to the effect, as stated, that no Federal question remained for consideration or now exists in the case. I am not aware of any precedent for such action in a case like this on the part of this court, and none has been referred to by counsel for the appellant who have so ably presented and argued this case. *No question whatever is made about the jurisdiction of the court trying the case originally and subsequently reviewing it on writ of error.* Believing from the petition itself, therefore, that the appellant is not entitled to the writ of *habeas corpus* or to the relief prayed, the application for the same is denied."

Thereafter, as has been already stated, an appeal from the judgment of the United States District Court for the Northern District of Georgia was allowed by Mr. Justice Lamar, pursuant to the provisions of the Act of Congress of March 10, 1908, Chapter 76 (35 Statutes at Large, p. 40).

In support of his appeal the appellant presents the following (*Rec. pp. 226-229*):

ASSIGNMENTS OF ERROR.

"*First.*—The said District Court of the United States erred in holding that the appellant's application and the exhibits and records therein referred to did not make a case wherein the said Court could properly allow the issuance of the writ of *habeas corpus* prayed for.

Second.—The said District Court of the United States erred in holding, that the denial by the Supreme Court of the United States and by the sev-

eral Justices thereof of appellant's application for a writ of error to the Supreme Court of Georgia, to review the judgment of that court affirming the judgment of the Superior Court of Fulton County, Georgia, denying the appellant's motion to set aside the verdict rendered in the said court convicting him of murder, deprived this appellant of his right to the issuance of a writ of *habeas corpus* as prayed for.

Third.—The said District Court of the United States erred in holding that it could not entertain the petition of the appellant for the issuance of a writ of *habeas corpus* herein because it would be the exercise by said Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the laws of the United States.

Fourth.—The said District Court of the United States erred in holding, that by entertaining the appellant's petition for a writ of *habeas corpus* it would do so in the face of alleged decisions of two Justices of this Court, and of this Court, that no Federal question remained for consideration, or now exists in this cause.

Fifth.—The said District Court of the United States erred in holding, that no question was made concerning the jurisdiction of the Superior Court of Fulton County, Georgia, in trying the indictment wherein the appellant was charged with the crime of murder.

Sixth.—The said District Court of the United States erred in holding, that the appellant is not entitled to the writ of *habeas corpus* or the relief prayed for, and that his application for the same should be denied.

Seventh.—The said District Court of the United States erred in refusing to hold, that the Superior

Court of Fulton County, Georgia, lost jurisdiction over the appellant on his trial for murder in said court, because of his involuntary absence from the court at the time of the rendition of the verdict against him and of the polling and discharge of the jury, said trial having thereby become a nullity, and the proceedings of said court in receiving said verdict and polling the jury and discharging it, were *coram non judice,* and devoid of due process of law.

Eighth.—The said District Court of the United States erred in refusing to hold that the judgment pronounced against the appellant in the Superior Court of Fulton County, Georgia, whereby he was sentenced to death and under which he is now in the custody of C. Wheeler Mangum, Sheriff of Fulton County, Georgia, was a nullity, and all subsequent proceedings thereto are nullities, because at the time when said judgment was pronounced the said Superior Court of Fulton County, Georgia, had lost jurisdiction over the appellant and of this cause.

Ninth.—The said District Court of the United States erred in refusing to hold, that the reception by the Superior Court of Fulton County, Georgia, on the appellant's trial for murder in said court, in his absence, of the verdict convicting him of the crime of murder, tended to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Tenth.—The said District Court of the United States erred in refusing to hold, that the appellant had the right to be present at every stage of his trial in the Superior Court of Fulton County, Georgia, including the reception of the verdict against him, the polling of the jury and the discharge of the jury, and that this right was a fundamental right essential to due process of law.

Eleventh.—The said District Court of the United States erred in refusing to hold, that the involuntary absence of the appellant at the time of the reception of the verdict on his trial in the Superior Court of Fulton County, Georgia, and the polling of the jury, deprived him of an opportunity to be heard, which constituted an essential prerequisite to due process of law.

Twelfth.—The said District Court of the United States erred in refusing to hold, that the appellant's opportunity to be heard on his trial in the Superior Court of Fulton County, Georgia, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Thirteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's right to be present during the entire trial, including the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, was one which neither he nor his counsel could waive nor abjure.

Fourteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's counsel having had no express or implied authorization from him to waive his presence at the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, and it being in any event beyond his constitutional power to give them such authority, their consent to the reception of the verdict in his absence was a nullity.

Fifteenth.—The said District Court of the United States erred in refusing to hold that since neither the appellant nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any ratifica-

tion by him or acquiescence on his part in any action taken by his counsel.

Sixteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's involuntary absence at the reception of the verdict rendered against him in the Superior Court of Fulton County, Georgia, constituting as it did an infraction of due process of law, incapable of being waived directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, his failure to raise the jurisdictional question on his motion for a new trial did not deprive him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon.

Seventeenth.—The said District Court of the United States erred in refusing to hold, that the appellant's trial in the Superior Court of Fulton County, Georgia, did not proceed in accordance with the orderly process of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to him and whose conduct intimidated the court and jury and unduly influenced them and neutralized and over-powered their judicial functions, and because for that reason he was deprived of due process of law and of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Eighteenth.—The said District Court of the United States erred in refusing to hold, that the decision of the Supreme Court of Georgia, which determined that the appellant's motion to set aside the verdict rendered against him in the Superior Court of Fulton County, Georgia, on the ground of his absence at the time of the rendition of said verdict, was not an available remedy to attack such verdict but that the objection should have been raised on the motion for a new trial, deprived the

appellant of a substantial right given to him by the law in force at the time to which his alleged guilt related and at the time of the reception of the verdict against him and of the presentation and decision of the motion for a new trial made by him, and took from him a right which at all of said times was vital to the protection of his life and liberty, and constituted the passing of an *ex post facto* law in violation of the prohibition contained in Article L, Section 10, of the Constitution of the United States, and was illegal and void.

Nineteenth.—The said District Court of the United States erred in refusing to hold, that the judgment of the Supreme Court of Georgia, rendered on November 14, 1914, deprived him of due process of law, and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States, because the Court thereby in effect declared, that in order to avail himself of his aforesaid constitutional rights, to wit, the assertion of his right to due process of law and to the equal protection of the laws, he would be compelled to subject himself to a second jeopardy, thus depriving him of his aforesaid constitutional rights except on the illegal condition of the surrender by him of the right secured to all persons charged with criminal offenses in the State of Georgia under paragraph 8, section 1, Article I, of the Constitution of said State."

POINTS.

I.

The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the Court and the nullification of the verdict and judgment.

STATEMENT OF APPELLANT'S POSITION.

The appellant was on trial, charged with the crime of murder, a capital offense. The Constitution of Georgia (*Art. VI, § 18, par. 1*) declares that "the trial by jury, except where it is otherwise provided in the Constitution, shall remain inviolate." A jury had been empaneled to try the appellant for the crime charged in the indictment. They were by *Art. I, §2, par. 1* of the Constitution made "the judges of the law and the facts."

Under another clause, it was further declared (*Art. I, § 1, par. 4*): "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State *in person*, by attorney, *or both*," and in the very next para-

graph of that instrument, this right was emphasized by the statement: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel."

The tribunal by which the appellant was thus to be tried, and before which he had the constitutional right to defend himself in person and by counsel, against the grave charge of which he stood indicted, consisted of the presiding judge, Hon. L. S. Roan, and a common law jury of twelve. If he was involuntarily deprived of the right of defense before this tribunal, at any stage of the trial, such deprivation constitutes, we contend, a denial of due process of law. Thus, if the entire trial had been conducted in his absence, or if he had been kept out of the court room while the witnesses of the prosecution were undergoing examination, or while the witnesses in his defense were sworn, or on alternate days, or while counsel were presenting their arguments, or whilst the court was instructing the jury, he would unquestionably have been deprived of the right to defend himself, of the opportunity to become a participant in the judicial investigation which had for its end the ascertainment of his guilt or innocence, and the determination as to whether or not his life and liberty were to be forfeited.

We shall presently show, that his involuntary absence at the time of the rendition of the verdict and the polling of the jury, in obedience to the wishes of the presiding judge, which were under the circumstances the equivalent of a command, was equally a deprivation of due process of law.

Before presenting the authorities on which we rely to substantiate that proposition, a consideration of the fundamental elements of due process,

as indicated by the decisions of this Court, will be useful.

The Essential Elements of Due Process.

Although the Court has, very wisely, refrained from attempting a comprehensive definition of due process, it has, nevertheless, determined, by a long line of decisions, that in so far it relates to legal procedure which may affect life, liberty or property, due process depends on the concurrence of two component elements, (1) notice to the person affected, of the proceedings by which he is sought to be charged or condemned, and (2) the right of the person proceeded against to a hearing or an opportunity to be heard in his defense.

We shall later under Point II indicate a third element, namely, a competent tribunal to pass on the subject-matter.

This right to be heard, or this opportunity to be heard, is not one which is limited to any particular phase of the proceeding. It is not granted, if it may be taken away or withheld at any stage of proceedings which may result in condemnation. It is co-extensive with the entire proceeding, from its beginning to its termination. Thus a party would be deprived of due process were he merely permitted to interpose an answer, and thereafter prohibited from participating in the trial of issues on which his life, liberty or property depended, or from examining and cross-examining witnesses, or from being present and heard at the various stages of the proceeding.

The right or opportunity to be heard in such a case would be idle, if accorded in the early or preliminary stages of a trial and denied at its culmin-

ation. The mere interposition of an answer or a plea, without the right of participation in the trial in all of its subsequent stages, would be the substitution of form for substance, and a disregard of the underlying purpose of legal process. The object of legal process, is not merely to bring a party into court, but to enable him, when brought there, to be present for the protection of his rights, and to meet any emergency that may arise, until judgment has been pronounced.

Hovey vs. *Elliott.*

The principle which we invoke was elaborately and lucidly considered in *Hovey* v. *Elliott, 167 U. S. 409*—a great constitutional landmark. There, the court of original jurisdiction had after the service of process and the joinder of issue stricken defendant's answer from its files, as a punishment for his contempt in refusing to obey one of its orders. In consequence, a decree *pro confesso* was entered against him. Its validity was challenged, and its nullity was adjudicated by this Court, because it was wanting in due process of law, from the instant that the defendant was debarred from being further heard in his defense. Mr. Justice White said:

"In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to

punish for a contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessary depends.

"In *McVeigh* v. *United States, 11 Wall. 259,* the court, through Mr. Justice Swayne, said (p. 267): 'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. *Calder* v. *Bull, 3 Dallas, 388; Bonaker* v. *Evans, 16 Adolphus & Ellis, 170; Capel* v. *Child, 2 Crompton & Jervis, 574.*'

"And quoting with approval this language, in *Windsor* v. *McVeigh, 93 U. S. 274,* the court, speaking through Mr. Justice Field, again said (pp. 277, 278): 'The principle stated in this terse language

lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. *A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.* It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.'

"This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. Thus Coke (*2 Inst. 346*), in commenting on the 29th chapter of Magna Charta, says: 'No man shall be disseized,

etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all), by the due course and process of law.' * * *

"Story, in his treatise on the Constitution (*vol. 2, § 1789*), speaking of the clause in the Fifth Amendment, where it is declared that no person 'shall be deprived of life, liberty or property without due process of law,' says: 'The other part of the clause is but an enlargement of the language of Magna Charta, '*nec super eum ibimus, nec super eum mittimus, nisi per legale judicium pariurn suorum, vel per legem terrae*' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legum terrae* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brougt in to answer thereto by due process of the common law. *So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.*'

"Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce

justice, courts possess the right to inflict the very wrongs which they were created to prevent."

"In *Galpin* v. *Page, 18 Wall. 350,* the court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'

"Again, in *Ex Parte Wall. 107 U. S. 265, 289,* the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College case*: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, *which proceeds upon inquiry and renders judgment only after trial.* The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they *'proceed upon inquiry,'* and *'render judgment only after trial.'*"

"The necessary effect of the judgment of the Supreme Court of the District of Columbia was to

decree that a portion of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the case. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law. If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, *why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law. No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards.*"

Windsor vs. *McVeigh.*

In *Windsor* v. *McVeigh, supra,* Mr. Justice Field in addition to what was quoted from his opinion in *Hovey* vs. *Elliott* (*supra*) said:

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its ap-

plication. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * *

"*So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose.* The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. *And the reason is, that the courts are not authorized to exert their power in that way.*

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, *according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.* * * *

"It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, *and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing.* And where, as in that case, no appearance was allowed, there could be

no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. *By the act of the court, the respondent was excluded from its jurisdiction.*"

The Right to Be Heard.

If, in *Hovey* v. *Elliott*, the court had not stricken out the answer, or, if in *Windsor* v. *McVeigh*, it had not stricken out the appearance of the owner of the property which was sought to be seized, and had heard the proofs of all the parties, but had, in the one case because of the defendant's contempt of court, and in the other because of the defendant's residence within the Confederate lines, refused a hearing on the final argument, there can be no doubt but that the judgments rendered in the cases cited would have been regarded as devoid of due process of law.

It is immaterial at what stage of the litigation the right to be heard, or the opportunity to be heard, is withheld. So long as it is actually interfered with by the direct or indirect action of the court, there is a denial of due process. This rule, which has been applied in civil actions which merely affect a right of property, is of superlative importance in a criminal action which involves life and liberty. It would be of little avail in such a case, for a defendant to appear before the court and jury long enough to interpose his plea, or at such times when the court might deem it advisable or prudent for him to be present, only to be treated at all other times as a stranger to the proceedings. That would amount to a virtual withholding of that opportunity to be heard which is vitally essential to a full and unrestrained defense. Indeed, in a criminal case, the hearing to

which the accused is entitled, is the right of defense, and that is not to be limited, curtailed or circumscribed. It is not to be suddenly cut off, when he is in direst need. If he may be locked up at a time when his fate hangs trembling in the balance, and when his judges are themselves subject to interrogation, is his right of defense not taken from him? If when the jury is about to render its verdict, he is absent, and his counsel are absent, and the prosecution and a hostile mob alone are present, to confront the twelve jurors, what has become of his opportunity to be heard which is the *sine qua non* of due process? Might not the jury reach the natural conclusion that the defense had been abandoned? Or, might they not be confirmed in the fear, that a verdict in favor of the accused, might prove their own death-warrant?

The prohibitions of the Fourteenth Amendment refer to all of the instrumentalities of the State, legislative, executive and judicial, and therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by that Amendment against deprivation by a State, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

> *Chicago Burlington & Quincy R. R. Co.* v *Chicago, 166 U. S. 226.*

The cases which have thus far been cited, were all instances of an infraction of due process of law by judicial authority.

As further indicating the application of the prohibitions of the Fourteenth Amendment to the judgment of a court, we refer to *Scott* v. *McNeal, 154 U. S. 34.*

That case involved the validity of a decree of a court of probate appointing an administrator of the estate of a living person, made after public notice. Mr. Justice Gray laid down the rule of decision applicable, in these admirable words:

"Their prohibitions extend to all acts of the State, whether through its legislative, its executive, *or its judicial authorities. Virginia* v. *Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, 100 U. S. 339, 346; Neal* v. *Delaware, 103 U. S. 370, 397.* And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank, 92 U. S. 542, 554,* repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely, 4 Wheat. 235, 244,* was intended '*to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*'

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must

decide for itself the true construction of the statute. *Huntington* v. *Attrill, 146 U. S. 657, 683, 684; Mobile & Ohio Railroad* v. *Tennessee, 153 U. S. 486, 492-495.*

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.' *Pennoyer* v. *Neff, 95 U. S. 714, 733.*"

Standard Oil Co. vs. *Missouri.*

One of the most recent applications of this doctrine is afforded by *Standard Oil Co.* v. *Missouri, 224 U. S. 270, 280-282,* where Mr. Justice Lamar said:

"The briefs and arguments for the defendants were addressed mainly to the proposition that the fine of $50,000 was a criminal sentence in a civil suit and void because beyond the jurisdiction of the court, and, for the further reason, that the pleadings and prayer gave no notice which would support such a sentence.

1.—It is, of course, essential to the validity of any judgment that the court rendering it should

have had jurisdiction, not only of the parties, but of the subject-matter. *Chicago, B. & Q. Ry. Co.* v. *Chicago, 166 U. S. 226, 234, 247.* * * *

2.—The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor* v. *McVeigh, 93 U. S. 274, 282.* See also *Reynolds* v. *Stockton, 140 U. S. 254, 265-268. Barnes* v. *Railway, 122 U. S. 1, 14.*"

Ex parte Riggins.

The interesting case of *Ex parte Riggins, 134 Fed. Rep. 404,* although reversed on the ground that *habeas corpus* was not the proper remedy, in *Riggins* v. *United States, 199 U. S. 547,* and in its general conclusion overruled in *Hodges* v. *United States 203 U. S. 1,* on the ground that the Fourteenth and Fifteenth Amendments operate solely on State action and not on individual action) nevertheless presents a valuable and apparently sound contribution to an important aspect of the subject, which we are now considering. Riggins was indicted in the United States District Court on the charge that he had, with others, conspired to murder one Maples, a negro, by lynching him, thus depriving him of his life without due process of law. It was claimed that those engaged in the conspiracy could be proceeded against on the theory that the Fourteenth and Fifteenth Amendments operated in individual action, as well as against State action. In sustaining this view of the case, Judge Jones made the following convincing comments on the general nature of due process of law:

"The general duty of the state to afford due process of law to all persons is discharged, in the first instance, as we have seen, by the passage of proper legislation, and providing proper modes for securing the enjoyment of life, liberty, property, and the pursuit of happiness. This, however, is in no wise true of another phase of the duty, such as arises here, when the right to have due process at the hands of the state involves the enjoyment of the due administration of judicial procedure. When that is the case, there are many things which the state and its officers

must do or cause to be done, and in individual cases, by physical and mental operations, as distinguished from the exercise of legislative or political power, before the citizen can have the enjoyment at the hands of the state of due process of law. *When the state seeks to punish the citizen for a crime, it must not only give the accused a right to appear before a lawful tribunal, but it must afford the opportunity as well. Having put the accused in jail, it must keep him safely and bring him before that tribunal. When it brings him there, it must bring his witnesses there, if they will not come. In Alabama it must confront him with a panel of his peers, from among whom he and the state elect a jury. A judge must be there to give the jury the law, and the prisoner may except and appeal, if dissatisfied with his rulings. The judge and jury must hear counsel in the prisoner's defense. Then the state must cause the jury to retire, where they will be guarded from outside influence, while they deliberate upon the guilt or innocence of the defendant, and then come again in court, in the prisoner's presence, and return a verdict. The prisoner, if dissatisfied, may poll the jury. He has the right to present whatever he can to the judge before sentence is pronounced, if found guilty, and then to have the execution of the sentence suspended until his appeal to the Supreme Court can be heard.*

Is it not clear that private individuals who overpower state officers, when they are endeavoring to protect a prisoner accused of crime, whom they have confined to the end that both he and the state may exercise their respective functions and rights before a judicial tribunal, and wrest the prisoner from their custody, and then murder him to punish him for the crime, do, in the constitutional sense, as well as in every other sense, deprive the prisoner of the enjoyment of due process at the hands of the state, and prevent the state from affording it? *No one can deny that.*

under the Constitution, it is the prisoner's right to enjoy the workings of such due process, and that it is the duty of the state, under the Fourteenth Amendment, to dispense such justice to him. These rights cannot be enjoyed, or the duty enjoined upon the state discharged, except from the undisturbed workings of the machinery of justice after its power has once been put in motion, until the period arrives in the particular case where it may rightly stop. Until it has done its perfect work, the administration of due process, which in a case like this cannot be enjoyed except by the regular and orderly working of judicial procedure, is not afforded by the state. It may be true the state was not at fault; but that does not obliterate the fact that it was prevented from causing to be done the physical and mental acts which alone constitute the discharge of the duty in this case, and that by means of lawless violence, directed at the state and the prisoner alike, the prisoner has been prevented from enjoying the right to have the state do or cause to be done the physical or mental tasks which alone can afford him due process of law.

It cannot be contended, with any foundation in reason, that the right, privilege, or immunity of the accused to have due process at the hands of the state is neither derived from nor secured by the Constitution of the United States. The phrase 'due process' has had a well-defined meaning for ages. It had been previously employed in the Fifth Amendment. Putting it in the Fourteenth Amendment not only granted, but directly defined, certain specific rights which inure to the benefit of every person, alien as well as citizen, and are 'derived from, dependent upon, or secured by the Constitution of the United States.' The right thus created and defined, in a case like this, involving life and liberty, is the right to enjoy the benefits of all proceedings which constitute a trial according to 'the law of the land.' But it cuts deeper than this. The law of the land,

applying to all persons impartially, might not afford some of the rights which this clause of the Constitution grants and secures to the citizen and compels the state to afford. If, for instance, the state should deprive a person of the benefit of counsel, it would not be due process of law. It it allowed a private person to pass judgment on him for crime, it would not be due process. Within certain limits the state may change its remedies at pleasure, but it must be 'with due regard to the landmarks established for the protection of the citizen.' It must not exercise 'arbitrary power, or depart from the principles of private right and distributive justice.' As declared by the Supreme Court, the Fourteenth Amendment, in its requisition concerning due process, 'is not too vague and indefinite to operate as a practical restraint.' *Hurtado* v. *California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.* As there declared, 'due process must, in the language of Mr. Webster, be, according to his familiar definition, the general law, or law which hears before it condemns, and which proceeds upon inquiry and renders judgment.' * * *

Under the due process clause, the vital essence of the grant, of what it shall consist, flows from the Constitution of the United States itself. It is beyond the power of the state in any way to withhold anything thus granted. From the very nature of the right, whenever the administration of due process involves the administration of judicial procedure, the state must not only pass fair laws, but through its officers must do, or cause to be done, certain physical and mental operations in individual cases, which operate directly upon a particular individual, the benefits of which he cannot enjoy unless the officers of the state are permitted to perform them or cause them to be performed, according to the established course of judicial procedure, when he is present and asserting his rights. Undoubtedly, then, private persons may defeat enjoyment, in the constitutional sense, of the right, privilege, or immunity of the citizen

to have the state afford him due process of law in many cases."

Further Authorities on the Right To Be Heard.

As illustrations of the application of the principle to *quasi* judicial power, we cite *Central of Georgia Railway* v. *Wright, 207 U. S. 127* and *Londoner* v. *Denver, 210 U. S. 385.*

In the first of these cases it was held that due process of law requires that opportunity to be heard as to the validity of a tax and the amount of the assessment be given to a taxpayer, who, without fraudulent intent and in the honest belief that he is not taxable, withholds property from tax returns, and this requirement is not satisfied where the taxpayer is allowed to attack the assessment only for fraud and corruption. The assessment of a tax is action judicial in its nature requiring for the exertion of the power such opportunity to appear as the circumstances of the case require, and this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining whether the taxpayer has been afforded due process of law. Mr. Justice Day said:

"In view of this statute as thus construed the question made is, whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward

upon a suit to collect taxes, or by independent suit to enjoin their collection. * * *

"It would be impossible to reconcile the different holdings in the State courts upon this subject. One class holds that upon the assessment of omitted property the taxpayer has no right to be heard, having by his failure to return submitted himself to 'the doom of the assessor.' Another class holds that in such cases there must be an opportunity to be heard before the taxpayer can be assessed, and that to deny him such right as a penalty for failure to return is a denial of due process of law secured to the taxpayer by many State Constitutions as well as the Fourteenth Amendment of the Constitution of the United States."

"Of course, this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining this question for itself."

"Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson* v. *New Orleans, 96 U. S. 97; Weyerhauser* v. *Minnesota, 176 U. S. 550; Hager* v. *Reclamation District, 111 U. S. 701.*

"In the late case of *Security Trust & Safety Vault Co.* v. *The City of Lexington, 203 U. S. 323,* decided at the last term of this court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property notice to the taxpayer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In that case it was further held that where the pro-

cedure in the State court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied."

"Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does the system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?"

Londoner v. *Denver* (*supra*), also involved the validity of an assessment for a local improvement. Mr. Justice Moody, dealing with the sufficiency of the hearing accorded by the legislature, said:

"In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this Court has regarded substance and not form. But where the Legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. * * * It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization. If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the

case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. *Pittsburg, &c. Railway Co.* v. *Backus, 154 U. S. 421, 426; Fallbrook Irrigation District* v. *Bradley, 164 U. S. 112, 171.* It is apparent that such a hearing was denied to the plaintiffs in error. * * * The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it."

In *City and County of Denver* v. *State Investment Co., 49 Col. 244, 112 Pac. Rep. 789, 33 L. R. A., N. S., 395,* which follows *Londoner* v. *Denver, 210 U. S. 373,* the court said:

"Unless the law authorizing the assessment expressly or by implication, provides for notice to the owner of the property to be affected, and gives him an opportunity to be heard at a specified time and place, before board or tribunal competent and ready to administer proper relief, concerning the correctness of the charge, before it is made conclusive, the constitutional guaranty that no person's property shall be taken withiut due process of law has been infringed. *Brown* v. *Denver, 7 Colo. 305, 3 Pac. 455.* Notice or citation of the time and place for hearing, or possibly a waiver thereof by the property owner, was therefore essential to vest in the council the power to create a valid lien for the cost of the improvement, and it was likewise essential that the hearing be before a tribunal competent to act. The denial to a party in such a case of the right to appear and to be fully heard is, in legal effect, a recall of the citation to him. *Windsor* v. *McVeigh, 93 U. S. 274.*

* * * A judgment, finding or decree rendered under such circumstances is an arbitrary edict without the sanction of law. As stated by Brannon, in his work on the 14th Amendment, page 251: 'Though there be service of process, yet, if the defendant is not allowed to make his defense, it is a withdrawal of the summons, 'a denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether,' because judgment without hearing is void.' * * * It certainly cannot be said that a party has had a hearing when he has been called to appear, or appears, before a tribunal with power to act and grant relief, and which recognizes that such party is entitled to the relief for which he prays, yet disclaims in itself power and authority in the premises, and refuses to hear evidence and act upon the matter. The right to property and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial."

The appellee will doubtless cite many decisions of this Court, in which it was held that the various statutes and proceedings affecting criminal and *quasi* criminal procedure in State courts, which were the subject of consideration, did not constitute a denial of due process of law. Of these cases, we deem it important to consider the following:

DECISIONS PROBABLY RELIED ON BY THE STATE.

Hurtado v. *California, 110 U. S. 516.*
Allen v. *Georgia, 166 U. S. 138.*
Brown v. *New Jersey, 175 U. S. 172.*
Maxwell v. *Dow, 176 U. S. 581.*
Simon v. *Craft, 182 U. S. 427.*
Twining v. *New Jersey, 211 U. S. 78.*
Hammond Packing Co. v. *Arkansas, 212 U. S. 322.*
Jordan v. *Massachusetts, 225 U. S. 167*
Garland v. *Washington, 232 U. S. 642.*

We believe all of these cases to be distinguishable from the present, and in order to point out the differences which exist between them and this, and the recognition in them of the fundamental principles on which we rely, we take the liberty of quoting at some length from the opinions rendered, declaring at the outset, that it is not our contention that the appellant's enforced absence from the court at the time of the reception of the verdict, was a mere interference with a privilege or immunity, but that it amounted to a deprivation of due process of law, within the meaning of the Fourteenth Amendment.

Hurtado vs. *California.*

In *Hurtado* v. *California, 110 U. S. 516,* it was held that the words "due process of law" in the Fourteenth Amendment, do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. After discussing the various definitions of the phrase, among them the language of Mr. Justice Miller in *Davidson* v.

New Orleans, 96 U. S. 97-105. "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case," Mr. Justice Matthews said:

"We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. * * * According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth

Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. * * *

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communi-

ties to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves those principles of liberty and justice, must be held to be due process of law."

Allen vs. *Georgia.*

In *Allen* v. *Georgia, 166 U. S. 138,* the prisoner had been convicted in the State court of murder, and sued out a writ of error from the Supreme Court of the State. On the day assigned for its hearing it appeared that he had escaped from jail and was a fugitive from justice. The court thereupon ordered the writ of error dismissed, unless he should within sixty days surrender himself or be recaptured, and when that time passed without either happening, the writ was dismissed. He was afterwards recaptured, and resentenced to death, whereupon he sued out a writ of error to this Court, assigning as error that the dismissal of his writ by the Supreme Court of Georgia was a denial of due process of law. This contention was denied, and in the course of the opinion Mr. Justice Brown said:

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a

State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. *The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.*

"We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offense; and it seems but a slight punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction."

Brown vs. *New Jersey.*

In *Brown* v. *New Jersey, 175 U. S. 172,* the question was presented as to whether a trial by a struck jury constituted due process of law. Dealing with this subject Mr. Justice Brewer said:

"The State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex parte Reggel, 114 U. S. 642; Iowa Central Railway* v. *Iowa, 160 U. S. 389; Chicago, B. & Q. Railroad* v. *Chicago, 166 U. S. 226.* * * *

"In providing for a trial by a struck jury, empanelled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of se-

lection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to *select* jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert, 116 U. S. 642.* The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained.' *Hayes* v. *Missouri, 120 U. S. 68, 71.*"

Maxwell vs. *Dow.*

In *Maxwell* v. *Dow, 176 U. S. 581,* the Court, following *Hurtado* v. *California,* decided that the trial of a person accused as a criminal by a petit jury of only eight persons instead of twelve, and his subsequent imprisonment after conviction, do not deprive him of his liberty without due process of law. Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are questions properly to be determined by the citizens of each State for themselves. Following the *Slaughter House Cases,* it was further held that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight Amendments to the Constitution against the powers of the Federal Government. Mr. Justice Peckham said:

"The question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado case, supra.* The distinct question was

there presented whether it was due process of law to prosecute a person charged with murder by an information under the State Constitution and Law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a petit jury of the number fixed by the common law. If the State have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado case* was decided are to be found gathered in *Hodgson* v. *Vermont, 168 U. S. 262; Holden* v. *Hardy, 169 U. S. 366, 384; Brown* v. *New Jersey, 175 U. S. 172; Bolln* v. *Nebraska, 176 U. S. 83.*

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado case* is a trial by jury mentioned as a necessary part of such process. * * * As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown* v. *New Jersey, 175 U. S. 172,* the State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.* The legislation in question is not, in our opinion, open to either of these objections."

Simon vs. *Craft.*

In *Simon* v. *Craft, 182 U. S. 427,* it was held that a person charged with being of unsound mind is not denied due process of law by being refused an

opportunity to defend, when, in fact, actual notice was served on him of the proceedings, and when, if he had chosen to do so, he was at liberty to make such defense as he deemed advisable. The due process clause in the Fourteenth Amendment to the Constitution does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an oppirtunity afforded to defend against it. Mr. Justice White said:

"The contention now urged is that notice imports an opportunity to defend, and that the return of the sheriff conclusively established that Mrs. Simon was taken into custody and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred that the State court interpreted the statute—that the purpose in the command of the writ, 'to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial,' was to enforce the attendance of the alleged *non compos*, rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in a fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing

herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting. The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form. *Louisville & Nashville Railroad Co.* v. *Schmidt, 177 U. S. 230.* We cannot, then, even on the assumption that Mrs. Simon was of sound mind and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable. The view we take of the statute was evidently the one adopted by the judge of the probate court, where the proceedings in lunacy were heard, since that court, upon the return of the sheriff, and the failure of the alleged lunatic to appear, either in person or by counsel, in order to protect her interests, entered an order appointing a guardian *ad litem* 'in the matter of the petition to inquire into her lunacy;' and an answer was filed by such guardian denying all the matters and things stated and contained in the petition, and requiring strict proof to be made thereof according to law."

Twining vs. *New Jersey.*

In *Twining* v. *New Jersey, 211 U. S. 78,* the question presented was whether exemption from compulsory self-incrimination in the State courts was secured by the Federal Constituion. In a masterly opinion, Mr. Justice Moody dealt with this subject from two points of view, first, whether such exemption was a privilege and immunity, and second, whether its denial was a deprivation

of due process of law within the meaning of the Fourteenth Amendment.

Dealing with the first proposition, the Court, following the decision in the *Slaughter House Cases, 16 Wall. 36,* decided that privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of State, and not of National, citizenship; that the first eight Amendments are restrictive only of National action, and that while the Fourteenth Amendment restrained and limited State action, it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first Eight Amendments. On the other hand, privileges and immunities of citizens of the United States were declared to be only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. The exemption from compulsory self-incrimination was declared not to be one of these.

Dealing with the second question, as to whether self-incrimination was a denial of due process of law, Mr. Justice Moody pointed out that, viewed historically, such exemption did not form part of the law of the land prior to the separation of the colonies from the mother-country, that it was therefore not one of the fundamental rights, immunities and privileges of citizens of the United States, and that the fact that exemption from compulsory self-incrimination was specifically enumerated in the guarantee of the Fifth Amendment, tended to show that it was to be regarded as a

separate right and not as an element of due process of law. In the course of this discussion the Court said (*p. 100*):

"What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray v. Hoboken Land Co., 18 How. 272, 280.*"

At *page 106* he said:

"But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."

At *page 107* he says:

"The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, State or National, for they are secured otherwise, but the rights fundamental in due process, and therefore

an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? * * * None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been implied in the 'law of the land' there secured."

He then pointed out that it was not included in the Petition of Right or in the Bill of Rights, or in most of the Constitutions of the original States, and then proceeds (*p. 110*):

"The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here confronted with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. *We need*

notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. *Neff, 95 U. S. 714, 733; Scott* v. *McNeal, 154 U. S. 34; Old Wayne Life Association* v. *McDonough, 204 U. S. 8,* and *that there shall be notice and opportunity for hearing given the parties, Hovey* v. *Elliott, 167 U. S. 409; Roller* v. *Holly, 176 U. S. 398;* and see *Londoner* v. *Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries,* this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. * * *

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases *proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard,* then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa Central* v. *Iowa, 160 U. S. 393*: 'But it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, *provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be*

heard before the issues are decided;' and in *Louisville & Nashville Railroad Co.* v. *Schmidt, 177 U. S. 230, 236*: 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State courts or regulate practice therein. All its requirements are complied with, *provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;'* * * *

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property.''*

Hammond Co. vs. *Arkansas.*

In *Hammond Packing Co.* v. *Arkansas 212 U. S. 322,* the constitutionality of the provisions of the anti-trust statute of Arkansas and the validity of the proceedings in the State courts thereunder, were in question. The action was brought to recover statutory penalties for a violation of the law. The act required corporations to produce books and papers, and upon the refusal of the corporation to comply with that requirement, the answer, motion, demurrer, or other pleading filed by the corporation, was on motion of the Attorney General or Prosecuting Attorney to be stricken out and judgment rendered against the

corporation. Dealing with that provision, Mr. Justice White said:

"Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by §9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey* v. *Elliott, 167 U. S. 409,* and the previous cases in this court which were there cited and applied. The ruling in *Hovey* v. *Elliott* was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in *Hovey* v. *Elliott,* if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in *Hovey* v. *Elliott* was in that case deduced from no special infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all time dominant and controlling where the Constitution is applicable. Indeed in *Hovey* v. *Elliott* the impotency of the legislative depart-

ment to endow the judicial with the capacity to disregard the Constitution was emphasized. But while this is true the question yet remains, Is the doctrine of *Hovey* v. *Elliott* here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if from doing so *it results that the authority exerted flows from a reservoir of unquestioned power it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power and not a mere incidental result arising from its exertion is the criterion by which its validity is to be measured. Hovey* v. *Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default.* The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, *as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey* v. *Elliott, and the power exerted in this, is as follows: In the former the process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the*

other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law."

Jordan vs. *Massachusetts.*

In *Jordan* v. *Massachusetts, 225 U. S. 167,* the accused had been convicted by a jury and sentenced to death. After the verdict one of the jurors became insane, and the court, after an inquiry had in accordance with the established procedure of the State, found by a preponderance of evidence that the juror was of sufficient mental capacity during the trial to act as such, and therefore refused to set the verdict aside. Dealing with this subject Mr. Justice Lurton said:

"Subject to the requirement of due process of law, the States are under no restriction as to their method of procedure in the administration of public justice. *That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned.* 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.' * * *

"Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent State court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence, would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the State not justified by the demands of justice, nor recognized by any definition of due process.

"In criminal cases due process of law is not denied by a State law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a State of the power to dispense with jury trial altogether. *Hurtado* v. *California, 110 U. S. 516; Maxwell* v. *Dow, 176 U. S. 581. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present,* the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution."

Garland vs. *Washington.*

In *Garland v. Washington, 232 U. S. 642,* the plaintiff in error claimed that he had been deprived of due process of law, because he had been convicted and sentenced on an information on which he had never been arraigned and to which he had never pleaded, and relied on *Crain v. United States 162 U. S. 625.* This contention was overruled, but upon grounds which sustain rather than combat our present contention. Thus Mr. Justice Day said:

"It is apparent that the case was tried and convicted upon an information charging an offense against the law; that he had a jury trial, with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him, was fully subserved in this case, for the accused had taken objections to the second information and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the Supreme Court of Washington, following its former decisions, held that the failure to enter the plea and deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution.

"Due process of law, this court has held, does not require the State to adopt any particular form of procedure, *so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Roger v. Peck, 199 U. S. 425, 435,* and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment *deprived the accused of any substantial right or in any wise changed the course of trial to his disadvantage.* All requirements of due process of law in criminal trials in a State, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court."

The case of *Crain* v. *United States, 162 U. S. 625*, was then considered, and the opinion continues:

"If a legal trial cannot be had without a plea to the indictment duly entered of record before trial, it would follow that such omission in the present case requires a reversal of the judgment of conviction, because the prisoner has been deprived of due process of law."

Appellee's Cases Distinguished.

While, in *Hurtado* v. *California,* it was declared to be within the power of the State to abolish the grand jury, and in *Maxwell* v. *Dow,* that it was within its power to abolish the petit jury, it by no means follows that one accused of crime in a State which has preserved these ancient institutions, may, without an indictment be tried before a judge without a jury, and be said thereby to be accorded due process of law. Nor would he in such a State, if tried before a common law jury, in accordance with the mode of procedure prevailing therein, be condemned by due process of law, if he were not permitted to be present on the trial, or if his presence were permitted during a part of the trial only. In the latter instance, he would be deprived of the hearing, or opportunity to be heard, without which due process is inconceivable. In other words, whatever the tribunal may be which is to pass upon his guilt or innocence he is deprived of due process unless he is enabled to defend himself before that tribunal, and to avail himself of his right to be heard, in such manner as is adapted to the nature and character of that tribunal and its modes of proce-

dure consonant with the ordinary principles of liberty and justice.

Allen v. *Georgia* related merely to a hearing on appeal after conviction. The right to appeal has never been regarded as a fundamental right. Moreover, Allen had lost the right to prosecute his appeal by his voluntary act. The distinction between a case like the present and *Allen* vs. *Georgia* was concisely stated by Mr. Justice White in *Hovey* vs. *Elliott, 167 U. S. 443,* as "between the inherent right of defence secured by the due process of law clause of the constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal."

Simon v. *Craft* was not a criminal case. It related to proceedings against one *non compos mentis,* who was given the right to a hearing but apparently did not avail herself of that right, and who was represented in the proceedings by a guardian *ad litem.*

Twining v. *New Jersey* related merely to immunity from self-crimination, which was shown by historical research not to be inherent in due process; and in that respect was distinguished from *Hovey* v. *Elliott, Scott* v. *McNeal* and *Londoner* v. *Denver,* which declared that the right to be heard constituted a fundamental prerequisite to due process of law.

Hammond Packing Co. v. *Arkansas* merely involved a rule of evidence which created a legal presumption, preservative rather than destructive of due process.

In *Jordan* v. *Massachusetts* and *Garland* v. *Washington,* there was not the slightest interfer-

ence with the right of the accused to be heard. In fact, in both cases, there was shown to have been a full and fair hearing.

Here, however, as the record unmistakably shows, the appellant was denied the right to be heard, not with his consent or approval, not because of his voluntary act, but by reason of the active and affirmative intervention of the court, which coerced his counsel, not only to consent without authority that the appellant should not be present at the rendition of the verdict, but also that the counsel should absent themselves at that time, by inspiring the fear that if the accused or his counsel were present in court at the reception of the verdict, and the jury should either acquit him or disagree, their lives would be imperiled by the hostile mob, which the presiding judge confessed himself to be unable to quell or to control, and which, in consequence, dominated the trial and paralyzed the orderly processes of law.

Ong Chang Wing v. *United States, 218 U. S. 280.*

THE RIGHT OF THE ACCUSED TO BE PRESENT AT EVERY STAGE OF HIS TRIAL ESSENTIAL TO THE RIGHT TO BE HEARD.

The constitutional right or opportunity to be heard, is not to be treated literally. It is not confined to the mere right of one accused of crime to appear in court and make a statement of his defense. It comprehends the right to defend, in person and by counsel, in the fullest sense of the term; to aid in the selection of the jurors; to hear

the allegations and proofs of the prosecution; to interrogate witnesses; to adduce testimony; to hear the rulings and instructions of the court; to see, and to be seen by, the jury, not while merely flitting in and out of the court-room, but during the entire proceedings. If he may be involuntarily kept out of or removed from the court-room at the last stage of the trial, it may be done at any other or at all othe rstages of the trial—during the selection of the jurors, the taking of testimony, the argument, or the charge. It is impossible to draw a line as to when his enforced absence would be either permissible or not allowable. The law has no way of determining at what moment of the trial his presence may be imperatively necessary for his protection, and has no way of knowing to what degree he has been injured, or what opportunities of defense he may have lost by his absence. Hence the only safe rule is to render his presence at every stage indispensable.

The law simply cannot permit any infraction whatever, be it of apparent consequence or not, of the defendant's right to be present at every moment of the trial. In a criminal case, where a prisoner is not required to become a witness, or in some jurisdictions, as in Georgia, where he cannot become a witness in his own behalf, but is merely permitted to make a statement "which shall not be under oath", (Penal Code, §§1036, 1037), he is nevertheless in evidence from the beginning to the end of the trial. His demeanor and conduct, his equanimity or excitement, his mere presence, constitute potent factors in the hearing, or opportunity to be heard, to which he is entitled under the Constitution. His personality speaks for him continuously. Who can say when

the decisive impression is made on the minds of those who sit in judgment? A jury may be, as it often has been, inclined in favor of the accused at the final moment of the trial, at the very instant when the verdict is to be pronounced, by his actions, which, to use a familiar and psychologically accurate phrase, often speak louder than words. It has been known that, even at that supreme period when the jury and the accused are brought face to face, a verdict of guilty agreed upon in the jury room, in the absence of the prisoner, has been withheld in his presence, and one of acquittal rendered. It is one thing to condemn a man *in absentia*. It is another, to look into his countenance and to declare his doom.

In *Nolan* v. *State, 55 Ga. 522,* Mr. Justice Bleckley refers to such a case:

"Many years ago, in the County of Fayette, I witnessed the polling of a jury on the return of a verdict of guilty, where the eleven jurors first called declared the verdict to be theirs, and only the twelfth man disowned it. The result was, that on considering the case, the whole twelve agreed to a verdict of not guilty, and the prisoner was acquitted."

This thought is also expressed with great felicity by Chief Justice Gibson in *Prine* v. *Commonwealth, 18 Pa. St. 103,* in language which was cited with approval by Mr. Justice Shiras in *Lewis* v. *United States, 146 U. S. 372*:

"It would be contrary to the dictates of humanity to let him (the accused) waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

In other words, the hearing or opportunity to be heard to which a defendant, especially in a capital case, is entitled, continues down to the very moment when the jury is actually discharged. This opportunity to be looked at by the jury is, in such a case, an opportunity to be heard, and may prove a most effective hearing. The human element continues to operate. The accused is a reality and not a mere abstraction. The eyes of the jury serve as the means of conveying to their minds an impression often more convincing than that which is borne through their ears. The accused is engaged in testifying to his guilt or innocence, to an intelligent observer, during every moment of his trial, even though he remain silent.

In *Rex* v. *Ladsingham, Sir T. Raym, 193,* it was quaintly said:

"Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time."

Emphasis is also laid in various of the authorities on the fact that, "at the rendition of the verdict, the prisoner is entitled to have the jury polled, so that each one shall answer on his own responsibility, *face to face with the prisoner,* as to his guilt or innocence."

Dunn v. *Commonwealth, 6 Pa. St. 384.*
Temple v. *Commonwealth, 14 Bush, Ky., 769.*
Nolan v. *State, 55 Ga. 522.*

The importance of observing the demeanor of the accused by the jury, is exemplified in *Rhodes* v. *State, 128 Ind. 189, s. c. 27 N. E. Rep. 866,* where a new trial was granted to a convicted defendant upon proof that the eyesight of one of the jurors was so defective that he was unable to distinguish one from another of the faces of the witnesses.

2 Moore on Facts, §§991-995.

Section 5732 of the Code of Georgia of 1910 recognizes the importance in the determination by a jury of an issue submitted to it, that it shall consider among other things "all the facts and circumstances of the case, *the witnesses' manner of testifying,* their intelligence" etc.

It is also conceivable, that before the verdict was rendered the accused might have asked the Court, and have been granted an opportunity to address the jury, or to make a forgotten or newly conceived suggestion bearing upon his defense, which might have exerted a controlling influence upon the minds of the jurors, or of some one of them; or he might have moved for a mistrial or made other appropriate motions.

The Right of the Accused to be Present at the Reception of the Verdict.

In the light of these elementary considerations, it becomes important to ponder the authorities which, with remarkable unanimity, have laid down the rule, that the reception of a verdict against one accused of a felony, in his absence and without his consent, he being at the time confined in

jail, is a nullity. In the Appendix printed at the end of the argument, is to be found a collation of all the decisions bearing on this subject, which we have been enabled to discover after a careful search. The decisions of this Court will be presently discussed. Where the name of any State does not appear in the list, it is because no decision is found in its reports dealing with the question. The States included are Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin. There is also a decision by the United States Court of Claims, and excerpts from various text writers and common law authorities follow.

From this array of authority, there is but one conclusion to be drawn, namely, that one accused of a capital offense may not be tried in his absence, and that a verdict received while he is incarcerated in jail, and all proceedings based thereon, are *coram non judice* and absolute nullities.

In *Cooley's Constitutional Limitations, Second Edition, §452,* that distinguished author says:

"In cases of felony, where the prisoner's life or liberty is imperiled, he has the right to be present and must be present, during the whole of the trial and until the final judgment. If he be absent, either in prison or by escape, *there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment.*"

In *McGehee on Due Process, pp. 164, 165, 168,* the author says:

"In criminal trials certain matters pertaining to procedure have been declared to involve fundamental rights, of which the person accused of crime may not be deprived without the denial of due process of law, while others are matters of form only. Generally, whatever matters are jurisdictional are essential and protected by the Constitution; matters which do not affect the competency of the court are not jurisdictional and are not protected. * * * So, also, under the same provision, (Fifth Amendment), the right of a person accused of felony, to be present during the whole of the trial, in the trial court, is a substantive right of which he cannot be deprived without due process of law, even with his consent."

Attention is also directed to the discussion of this subject in *1 Bishop's New Criminal Procedure, Edition 1913, §§265-274.*

The Georgia Decisions.

The decisions of Georgia bearing upon this point are clear and outspoken, and with one accord recognize the applicability of this principle to circumstances precisely like those detailed in the present record. In fact the Supreme Court of Georgia, in the opinion rendered on the denial of the appellant's motion to set aside the verdict rendered against him, in so many words announced that "it is the right of a defendant on trial for crime in this State to be present at every stage of his trial, and to be tried according to established procedure."

Although all of the Georgia decisions are to be found in the Appendix, we deem it desirable at this time to call attention to a number of the more important ones.

In *Nolan* vs. *State, 53 Ga. 137,* the defendant had been indicted for murder, and the jury returned a verdict finding him guilty of voluntary manslaughter, the verdict being rendered in his absence. A motion in arrest of judgment was made on that ground, and was held not to be the proper method for raising the question sought to be presented, and the judgment was affirmed. The Court, however, pointed out that the proper remedy was by motion to set aside the verdict, because the defendant's absence when the verdict was rendered was a fact extrinsic of the record. Chief Justice Warner concisely declared:

"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

After this affirmance of the conviction of Nolan by the Supreme Court, a motion was made in the court of first instance, to set aside the verdict on the ground that it had been rendered and published in his absence, and the motion was granted. The effect of granting this motion was subsequently considered in *Nolan* vs. *State, 55 Ga. 522.* In the course of his opinion, Mr. Justice Bleckley said:

"The error of receiving a formal verdict in the prisoner's absence would be nothing if the

jury had been retained in the box and required to render a valid one in his presence. The mischief was done by discharging the jury without any legal necessity, and without obtaining from it something that the law could recognize as a verdict. The prisoner was once fully in the power of that jury, and he had a right to such a verdict, *as each several juror could avow before his face.*"

In *Bonner* vs. *State, 67 Ga. 510,* Chief Justice Jackson said:

"The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the jury. *12 Ga. 25.* And such was the rule and practice at common law. *Wharton's Crim. Plead & Prac. 540a, 545, 546, 549, 550.*"

In *Barton* v. *State, 67 Ga. 653,* Chief Justice Jackson said:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial—*especially at the rendition of the verdict,* and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. *Nolan* v. *State, 53 Ga. 137; Ib. 55, 521.* The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into court by its order."

This language was quoted with approval in *Diaz v. United States, 223 U. S. 456.*

In *Bagwell* v. *State, 129 Ga. 170, s. c. 58 S. E. Rep. 650,* which was also a conviction of murder,

it appeared that, after the case had been submitted to the jury, the court, without the defendant's consent and in his absence, he being at the time confined in jail, and in the absence of his counsel, discharged the jury without a verdict on the ground of their inability to agree. The validity of this act as applicable to a subsequent trial, was presented on a review of a judgment of conviction. In the course of its opinion the court said:

"It has been frequently held by this court that it is the right of the accused charged with a felony to be present at every stage of his trial, including his arraignment or waiver thereof (*Wells* v. *Terrell, 121 Ga. 368, s. c. 49 S. E. 319*), reading to the jury notes of the evidence taken by the court (*Wade* v. *State, 12 Ga. 25*), the argument of counsel for the State (*Tiller v. State, 96 Ga. 430, 23 S. E. 825*), during the charge of the court (*Hopson* v. *State, 115 Ga. 90, 42 S. E. 412*), and at the *rendition of the verdict* (*Nolan* v. *State, 53 Ga. 137, 55 Ga. 521, 21 Am. Rep. 281; Barton* v. *State, 67 Ga. 653, 44 Am. Rep. 743*)."

In *Cawthon* v. *State, 119 Ga. 395, s. c. 46 S. E. Rep. 897,* Mr. Justice Cobb said:

"Where the accused is in custody, and does not consent that the verdict shall be received in his absence, the reception of the verdict while he is thus involuntarily absent will render the same illegal. *Nolan* v. *State, 53 Ga. 137, s. c. 55 Ga. 521; Rose* v. *State, 20 Ohio, 31; People* v. *Perkins, 1 Wend. 91; State* v. *Ford, 31 La. Ann. 311.*"

In *Lyons* v. *State, 7 Ga. App. 50, s. c. 66 S. E. Rep. 149,* the defendant had been convicted of a felony, the verdict being rendered while he was absent in jail. An order denying his application to set aside the verdict was entered, but on ap-

peal was reversed. Chief Judge Hill, after citing with approval the opinions in *Nolan* v. *State* and *Barton* v. *State, supra,* said:

"It cannot be questioned that the defendant had a right to be present during the whole of the trial and until the rendition of the verdict. This is a right so clearly and generally established that we deem it unnecessary to cite any authority. In some jurisdictions it is held that this right is limited to cases of felony, but the Penal Code of this State makes no distinction in this respect between felonies and misdemeanors. The accused has the right in all criminal cases to be present during the entire trial, not only in person, but also by his counsel. *Const. Ga. art 1, §1, par. 4.* 'The presence of the counsel was no substitute for that of the man on trial. Both should have been present.' *Bonner* v. *State, 67 Ga. 510; Martin* v. *State, 51 Ga. 567; Wilson* v. *State, 87 Ga. 584, 13 S. E. 566.* 'The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done with the case.' *Bagwell* v. *State, 129 Ga. 172, 58 S. E. 650.*"

There is thus an unbroken line of authority in Georgia, which announces, in unqualified terms, the rule making the presence of a defendant charged with felony, at the time of the rendition of a verdict against him, where he is in the custody of the court at the time of the trial, a prerequisite to a legal trial.

The Decisions of this Court.

This doctrine is clearly recognized by the decisions of this Court, and has been applied under conditions identical in character with those existing here.

Thus, in *Hopt* vs. *Utah, 110 U. S. 574,* it was held that the trial of challenges to proposed jurors in felony cases, by triers appointed by the court, must be had in the presence of the accused as well as of the court; and that the presence of the accused cannot be dispensed with. Mr. Justice Harlan said:

"The prisoner is entitled to an impartial jury composed of persons not disqualified by statute and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defence may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins."

And we may add that, necessarily, that right to be present only ends when the verdict of the jury has been rendered.

That part of the opinion which deals with this proposition, concludes as follows:

"Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for a felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. *If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.*"

In *Ball* v. *United States, 140 U. S. 118,* Chief Justice Fuller said:

"At common law no judgment for corporal punishment could be pronounced against a man in his absence, and in all capital felonies it was essential that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced."

In *Schwab* vs. *Berggren, 143 U. S. 442, 448,* the defendants were convicted of murder in the State Court of Illinois. An appeal was taken to the Supreme Court, where there was an affirmance. The defendants were not present upon the affirmance of the judgment, and it was claimed that this fact brought the case within the principle requiring the presence of a prisoner at every stage of the trial. A writ of habeas corpus was sued in the United States Circuit Court to procure the defendant's discharge because of their absence from the appellate tribunal at the time of the announcement of its decision. A demurrer to the petition was sustained, and the case was then brought here. Although this Court held that the rule relating to the presence in court of one accused did not require his presence at the time of the affirmance of his conviction on appeal, the principle for which we here contend was nevertheless emphatically recognized by Mr. Justice Harlan, who said (p. 448):

"The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

In *Lewis* vs. *United States, 146 U. S., 370,* it was held to be error to permit challenges to be made to jurors whose names appeared on the jury lists, in the absence of the defendant. Mr. Justice Shiras, speaking for the Court, said:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

The point made was that the accused had been required to challenge the jury from a list, and without an opportunity of first seeing the jurors face to face.

Dealing with this proposition the opinion continues:

"Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed."

In *Dowdell* vs. *United States, 221 U. S. 331,* Mr. Justice Day said:

"In *Hopt* v. *Utah, 110 U. S. 574,* this court held that due process of law required the accused to be present at every stage of the trial."

In *Diaz* vs. *United States, 223 U. S. 442, 455,* speaking of the necessity for the presence at every stage of the trial of a defendant on trial for felony, who is not at large on bail, Mr. Justice Van Devanter said:

"In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury *and the reception of the verdict,* and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction."

The opinion then quotes at length from that of the Supreme Court of Georgia in *Barton* vs. *State, supra,* the passage which we have above quoted.

In this connection, we refer to *Hibben* vs. *Smith, 191 U. S. 310,* where it was held that the due process clause of the Fourteenth Amendment places the same inhibition on the States as does the Fifth Amendment upon the Federal Government. This makes the decisions of this Court, above quoted, especially important in the present case.

See also *French* vs. *Barber Asphalt Paving Co., 181 U. S. 324.*

In *Maurer* vs. *The People, 43 N. Y. 1,* a conviction was reversed where, on a trial for murder,

after the jury had retired to deliberate on its verdict, it returned into court and asked certain questions as to what had been the evidence on particular points, to which the court gave the information requested in the presence of the prisoner's counsel, the prisoner being absent. It was held that this was a proceeding upon the trial, and the prisoner not being present, the action of the Court was illegal. Judge Grover said:

"The clause, 'during such trial,' as used in the statute [a mere codification of the common law]. includes all proceedings had in empaneling the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, receiving and recording the verdict. In all these proceedings, the legislature has deemed the presence of the accused essential to the attainment of justice and the protection of the innocent. The charge of the court to the jury includes all instructions of the court to the jury upon points of law, and all comments upon the evidence. Those familiar with trials for crime must be aware that the presence of the accused is quite as necessary and important to him during the latter as the former."

II.

Not only was the appellant deprived of due process of law, because he was by the action of the court, kept out of the court-room when the verdict was rendered, but the entire proceedings became coram non judice, because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the Court.

In his petition the appellant avers (*Rec. p. 8*):

"My trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to me, and whose conduct intimidated the court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and for that reason also I was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke."

The petition shows throughout, that the crowds which gathered, both within and without the court room, were boisterous, were inimical to the appellant and his counsel, and gave evidence of intense partisanship in favor of the prosecution, to such a degree that the presiding judge became thoroughly alarmed, and, in the presence of the jury, conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Regiment stationed there, who were well known to the jury.

The public press of Atlanta as well, apprehending danger on the Saturday preceding the submission of the case to the jury, if the trial continued on that day, united in a request to the court that the proceedings should not continue on Saturday evening. Although this request was heeded and the trial was adjourned until the following Monday, public excitement did not subside, but continued as intense as it had previously been.

Instead of quelling the outbursts of the mob, or seeking to control its demonstrations, or asserting the judicial power and enabling justice to pursue its uninterrupted sway, the Court surrendered and abdicated its functions, and temporized with those whose lawlessness defied the duly constituted authorities, at the decisive moments of the trial, and permitted itself to be coerced, by ominous threats of prejudice and by the terrors of violence, into denying one of the most substantial and elementary rights of the man whose steadfast insistence on his innocence had inflamed the hostile passions of his enemies. What the court did at this important moment, which meant life or death to the accused, was a judicial admission that the administration of justice had broken down, that its proceedings were controlled by the mob, that it was powerless to protect the man on trial in his legal rights, and that fear of its action hovered like an evil spell over the tribunal which was to hear and decide his guilt or innocence without the intervention of unauthorized participants.

Thus influenced by considerations irreconcilable and inconsistent with due process of law, with the avowed purpose of avoiding an outburst from the dominating mob which might result in

the murder of the prisoner at the bar and of his counsel, in the very sanctuary of the law, entitled though they there were to its protection, the Court drove them forth from the forum where they were struggling for the appellants' life and left it in the unrestrained possession of the prosecution, and of those who came to desecrate the temple of justice, to exercise upon the jury the same constraint that they had successfully brought to bear upon the court.

The trial to which the appellant was entitled, as part of that due process which was guaranteed to him by the Constitution, was a fair trial. As was well said by Judge Vann in *People* v. *Wolf, 183 N. Y. 472*:

"An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. * * * A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law."

Here, the trial was permitted to degenerate into a judicial lynching, when the mob triumphantly intervened and was permitted to control and dominate the instrumentalities of juridical procedure, to terrify the Court itself, and neutralize the judicial function. There was no longer a court or a jury. They were as though they had never been. There ceased to be a trial or a hearing, or an opportunity to be heard. For all practical purposes, the court might as well have handed the appellant over to the tender mercies of the boisterous bystanders who were clamoring for his blood, as to proceed with the formality of a

trial which ceased to be an inquiry into the appellant's guilt, and became a mere plaything of unrestrained lawlessness.

It is true that neither the court nor the jury was physically attacked, but it is impossible to believe, from the facts which stand uncontradicted on the record, that the jury was not made to feel that its only function was to register the will of the mob. When the jurors returned into the court room, and found the prisoner absent, and his counsel absent, with none to look into their faces but the excited multitude, and when, after the first juror had been polled, the tumult of applause and the cheers that were bellowed were so resounding as to prevent the responses of the jurors as they were polled, from being heard ten feet away, is it possible to believe that these jurors acted as free moral agents, or that they were not subjected to a species of duress that swept from their minds every thought save that of personal jeopardy?

A trial amid such concomitants, is a mere travesty. It is not a legal proceeding. It is not conducted in a tribunal in which justice is administered in a secure and orderly manner, free from external coercive influences, calmly, soberly, without fear or favor, without passion or prejudice. It is rather a tribunal where law has been dethroned, where terror reigns, and where fear sits trembling on the judgment seat.

A fair trial is universally recognized as one of the conditions without which due process of law cannot exist.

5 Cyc. of U. S. Sup. Ct. Rep., 618, and cases cited.

The effect of demonstrations by a mob and the fear engendered thereby in the mind of a court, and their influence on a jury, in criminal cases, is discussed with great force, and remarkable relevancy to the present case, in the following authorities, which show that a trial which is not fair and impartial, which is dominated by a mob, is not a legal proceeding, but a mere mockery:

In *Massey* v. *State, 31 Tex. Cr. Rep. 371, s. c. 20 S. W. Rep. 758,* a negro was tried on an indictment for rape upon a white woman. It was claimed that he had been deprived of a fair and impartial trial by the presence of a mob in the court room. One of the defendant's counsel, appointed by the court, applied for a change of venue. The court refused the application, for the reason "that it would at once precipitate an attack upon the jail, which he desired to avoid." There was a conviction, which was set aside, the court declaring that to decide that a trial under such circumstances was fair, impartial and legal, would be a travesty on decency, law, common sense and justice, notwithstanding that good men may have tried the prisoner. In the course of the opinion the court made use of the following language, the application of which to the present case is unmistakable:

"Appellant was not present when the verdict was reached and returned into court. But the state replies that he waived this right. He did; but under what circumstances was this so-called waiver made? 'While the jury were out, considering of their verdict, the honorable district judge who tried the case advised defendant's counsel to have defendant to waive his right to be present at the reading of the verdict, as under the circum-

stances it was best to have him safely in jail. The county attorney then wrote out a waiver, which defendant's attorney brought to the jail, and defendant signed it. Neither the honorable judge nor the county attorney denies these things, nor is there any explanation of this matter. Why was it best to have defendant safely in jail? What were the circumstances which rendered it best to have him safely in jail? The answer to these questions is evident. The spirit, if not the presence, of that same howling, threatening, tumultuous, bloodthirsty mob, had overawed justice, dominated the court, and thus deprived the appellant of the right to be present in court when the issue of his life or death was being settled. Did the appellant waive his right to be present when the jury returned their verdict? He did not. This so-called waiver was forced upon him. He was compelled to make it, or take the risk of being hung by the mob in the event the jury failed to hang him. It would be an insult to law, justice and common sense to submit an argument or cite authorities to prove that the act of appellant, called a 'waiver,' was not such as would be binding upon him. Appellant had a right to a fair and impartial trial, which was denied him by a mob. He had a right to be present in court. It was his court, the court of every citizen of this state. Its portals must be kept open, and no mob has a right to close them against a citizen who is being tried for his life, liberty, or property. He was deprived of this right by a mob, and not by the court; for the writer is impressed by this record with the belief that the ruling of the court in regard to the change of venue and motion for a new trial was made to save defendant from the vengeance of the mob. But it is contended that the mob, when the verdict was returned had dispersed; that in fact there was no danger to appellant. *The honorable judge did not so view the situation, or he would not have requested the waiver.*"

In *State v. Welden, 91 S. C. 29, s. c. 39 L. R. A., N. S. 667,* it was held that a conviction of murder would be set aside where the court room was filled with a hostile crowd, who threatened to lynch the prisoner, so that the counsel called upon to defend him did not dare to ask for the customary time for preparation, and the space about the judge, counsel and witnesses was so filled with people that counsel for the accused could not see the witnesses, and failed to see the jury until he arose to address them. In the course of the opinion Mr. Justice Woods said:

"An immense number of people assembled at the trial intensely hostile to the accused, and crowded the courthouse. The defendants being without counsel, the presiding judge sent for Mr. W. F. Clayton and requested him to undertake their defense. On his way to the court through the dense crowd, Mr. Clayton 'heard expression in regard to lynching' which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoners would be lynched, and under the compulsion of this fear he gave up that most vital right, and went immediately into the trial without preparation. That the danger of mob violence was present and imminent is made further manifest by the statements of Mr. Lucien W. McLemore and the stenographer of the court, Mr. F. F. Covington, both witnesses of high character. Not a particle of evidence was offered by the state to controvert this showing. The presiding judge, it is true, says that the crowd was quiet, and that it manifested no mob spirit to his eye nor in his hearing; but this statement does not impair the force of the testimony of those who mingled with people, and thus had better opportunity to observe. Thus it appears, beyond all doubt, that the circumstances of the trial were such that counsel of experience and courage *gave up, under the most urgent compulsion, the right*

to three days' preparation guaranteed to the accused by the law; and that, too, when he had been called into the case by the court without previous notice. Compulsion is sufficient to annul a will or a contract for the sale of property. How, then, can it be held that a trial involving life or death was fair and impartial, according to the law of the land, when the accused, under the compulsion of a reasonable apprehension of lawless violence, surrenders a right vital to his defense?

"In an opinion delivered by the distinguished Judge Elliott, the Supreme Court of Indiana, under circumstances very similar to those appearing here, set aside for compulsion a plea of guilty, which defendant's counsel showed to the court had been entered, by their advice, on the reasonable apprehension that if their client should be acquitted he would be lynched. *Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29.*"

In *Sanders v. State, 85 Ind. 319,* a judgment entered on a plea of guilty, interposed by one accused of murder on the advice of his counsel, who believed at the time that it was the only way in which his life might be saved from the imminent danger of mob violence, was vacated, Mr. Justice Elliott most pertinently saying:

"There were strong reasons in support of the appellant's prayer. All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a promisory note because of fear is

entitled to relief. A man who executes a deed under duress is entitled to judicial assistance. A will executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law they are null. If such things are null when procured by fear, or extorted by violence, should not a plea be so, when to have refused it would have been to put in jeopardy the life of the man arraigned upon a charge of felony? In many respects the facts of this case go far beyond that of ordinary cases of duress, for here the officers of the law, judge, sheriffs and jailers were inspired with fear of violence; counsel of age and experience, influenced by the appearances of danger that surrounded their client, secured from him a reluctant acquiescence to the plea of guilty."

See also

People v. *Fleming, 136 Pac. Rep. 291.*
Myers v. *State, 97 Ga. 76.*
Collier v. *State, 115 Ga. 803, 42 S. E. Rep. 226.*

The remarks of Mr. Justice Holmes, in the opinion rendered by him on the denial of the appellant's application for a writ of error to the Supreme Court of Georgia (*Rec., p. 13*), are the natural expression of protest against the proceedings by means of which the appellant is sought to be deprived of his life:

"I understand that I am to assume that the allegations of fact in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, though by the

presiding judge to be ready for violence unless a verdict of guilty was rendered."

The language of Judge Jones in *Ex parte Riggins, 134 Fed. Rep. 404,* which is quoted at length under Point I (*pp. 36 to 40, supra*), is applicable here, in its full vigor. These words, however, are worthy of repetition in this connection:

"No one can deny that, under the Constitution, it is the prisoner's right to enjoy the workings of such due process, and that it is the duty of the State, under the Fourteenth Amendment, to dispense such justice to him. These rights cannot be enjoyed, or the duty enjoined upon the State discharged, except from the undisturbed workings of the machinery of justice after its power has once been put in motion, until the period arrives in the particular case where it may rightly stop. Until it has done its perfect work, the administration of due process, which in a case like this cannot be enjoyed except by the regular and orderly working of judicial procedure, is not afforded by the State."

The abdication by a court of its powers, whether voluntarily or involuntarily, operates as a dissolution of the court.

In *Ellerbee v. State, 75 Miss. 522, s. c. 41 L. R. A. 569,* it was held that the temporary relinquishment by a judge of his functions, on a trial for felony, by departing from the court room, leaving a member of the bar presiding in his absence, which lasted about twenty minutes, during which the trial proceeded, amounted to a dissolution of the court, which rendered the trial a nullity.

To the same effect are the decisions in

Blend v. People, 41 N. Y. 604.
People v. Shaw, 3 Hun, 272; aff'd. 63 N. Y. 36.
Hinman v. People, 13 Hun, 266.
Hayes v. Georgia, 58 Ga. 35.
O'Brien v. People, 17 Col. 561.
McClure v. State, 77 Ind. 287.

A court is no more deprived of jurisdiction, by the fact that the presiding judge absents himself physically, than by the fact that he surrenders his control over the judicial proceedings pending before him, to a mob, although he be physically present.

As said in *Pennoyer* v. *Neff, 95 U. S. 714,* to give legal proceedings any validity, "*there must be a competent tribunal* to pass upon their subject-matter." How can it be said that there is "a competent tribunal," where the established instrumentality of justice has lost control over its proceedings? If the mob had driven Judge Roon from the bench, its domination of the proceedings would have been no more complete, than it in fact was when fear of it overthrew the judicial faculty.

The absence of the appellant at the time of the rendition of the verdict, was symptomatic of the conditions which prevailed during the entire trial, and which culminated in the conclusion by the court, that his life and the lives of his counsel were in extreme jeopardy from mob violence. It was this condition which induced the trial judge to insist upon a waiver on behalf of the prisoner of his right to be present, and which led him to induce appellant's counsel to avoid the conse-

quences of a hostile demonstration from a dangerous crowd, "ready for violence unless a verdict of guilty was rendered."

In *United States* v. *Shipp, 203 U. S. 563,* Johnson, a negro, had been convicted of rape in the State court of Tennessee, and sentenced to death. He presented to the United States Circuit Court his petition for a writ of habeas corpus, which was denied. He then appealed to this Court, and an order staying proceedings was issued. Before the appeal was argued, a mob broke into the jail at Chattanooga and hung him. Proceedings to punish the sheriff and others for contempt then followed. It was urged that this Court had no jurisdiction of the appeal, because the cause did not involve a violation of any rights secured to the prisoner under the Constitution of the United States. The petition for the writ of habeas corpus alleged, that negroes were excluded illegally from the grand and petit juries, that the prisoner's counsel was deterred from pleading this fact or of challenging the array, or asking for a change of venue, or a continuance, or moving for a new trial, or for an appeal, from fear of mob violence. Mr. Justice Holmes, speaking for this Court, said:

"We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. . . . We shall say no more than that it does not appear to us clear that the subject-matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied."

III.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure.

The record shows beyond a doubt, that Frank did not know that his counsel were requested by the Court to waive his presence at the time of the rendition of the verdict, or that they had in fact agreed that he should not be present, and that he did not in fact learn of this arrangement until after the verdict had been rendered, the jury discharged and the sentence of death pronounced upon him. It is also shown that he had never authorized his attorneys or any other person to waive his appearance at the time of the rendition of the verdict, or to waive their own presence at that time, and that he did not know until after he had been sentenced to death that the verdict convicting him of murder had been received in the absence of his counsel, and that they were not present when the jury was polled by the Court. It is not even intimated in the record that it was agreed on his behalf that the jury should be polled. The statement to that effect in the opinion of Supreme Court of Georgia (*Rec. p.*) is unwarranted.

The facts discussed under Point II stand admitted, and demonstrate that when appellant's counsel complied with the request of the Court,

that neither they nor their client should be present when the verdict should be received, they were under duress.

The question therefore arises, whether the attempted waiver of his presence by his counsel is for any purpose effective, when he was not voluntarily absent, when he was not at large on bail, but was in the actual custody of the court, and when it is shown that he did not personally waive the right to be present, and did not authorize his counsel to make such waiver. We contend not only that, under the circumstances of this case, there was no waiver, but also that there could be none, both for the reason discussed under the foregoing Point, but for the additional ones, now to be considered.

Georgia Decisions.

Here, again, the decisions of Georgia speak in the most conclusive terms.

In *Barton* vs. *State, 67 Ga. 653,* a distinction was made between the case of a prisoner in custody and one who was out on bail and absent when the verdict was rendered. After laying down the rule contained in the passage from this opinion above quoted, and adopted by this Court in *Diaz* vs. *United States,* Chief Justice Jackson continued:

"But the case is quite different, when after being present during the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room where he and his bail obligated themselves that he should be. This difference is plainly indicated by the ruling in the Nolan case in the fifty-fifth Geor-

gia, and the opinion of the court delivered in that case by Judge Bleckley. And the absolute necessity of the distinction, for the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered. * * * It ought not to be, because it would put it in the power of defendants on bail to block their conviction for felonies forever; it cannot be because the very object of all criminal law is punishment for crime, and without verdicts there can be no punishment for crime."

In *Robson* vs. *State, 83 Ga. 171,* Chief Justice Bleckley said:

"When the verdict was brought into court the accused was at large on bond, and was voluntarily absent. His counsel being present consented to the reception and publication of the verdict. We see not why the voluntary absence alone would not be good cause for proceding with this necessary step in the trial. Barton *vs.* State, 67 Ga. 653. It was the privilege of the accused to be present, but its exercise rested upon his will alone. *He was under no restraint or constraint by the action of the court.*"

In *Cawthon* vs. *State, supra,* the assignment of error contained in the bill of exceptions was worded in the following language:

"After the evidence, statement of prisoner, the argument of counsel, and the charge of the court had been concluded, and while the jury were out considering their verdict in the case, the presiding Judge, with the consent of the defendant's counsel, and in the interest of the safety of the prisoner and the preservation of order, sent the defendant back to jail, and the verdict finding him guilty of murder was received in the absence of the

prisoner, who was in jail under this charge, and could not control his own movements; and such reception of the verdict in the absence of the defendant, being also with the consent of defendant's counsel, who stated that they would take no exception thereto, and in the interest of the prisoner's safety and of the preservation of order. The defendant excepts to the receiving of the verdict finding him guilty of murder in his absence, as being illegal and in violation of his constitutional and statutory right to be present in the court room when the verdict was received, and says that his counsel, though acting in the most perfect good faith and in the interest of his personal safety, had no legal authority to waive his right to be present, and he says that for this reason the verdict in this case and the sentence based on said verdict should be held to be illegal and set aside."

Mr. Justice Cobb, after conceding the general principle to be, as shown by the excerpt from his opinion already quoted, added, that it had been settled in Georgia that the voluntary absence of the accused at the time of the reception of the verdict would not vitiate the verdict, and expressed it to be his individual view that the accused may himself waive his right to be present. The opinion proceeds:

"The open question in this State is whether his counsel can make the waiver for him. There is an intimation in Robson *vs.* State, 83 Ga. 167, 9 S. E. 610, that counsel might make an express waiver; but the point was not directly involved. * * * The weight of authority in other jurisdictions seems, however, to be that counsel cannot waive the right of the accused to be present. See *Rex* vs. *Streak, 2 Car. & P. 413; Fight* vs. *State, 28 Am. Dec. 630 (notes); State* vs. *Kelly, 97 N. C. 407, 2 S. E. 185,* and cases cited. * * * These decisions seem to draw no distinction between a

waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. * * *

Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver; his authority arising from the mere relation of attorney and client. * * * But under the facts of this case it is not necessary for a direct ruling to be made upon this point, as, in our opinion, a waiver by counsel in the presence of the accused, unrepudiated by him at the time of the waiver, is so binding as to make valid any action of the court based thereon."

In *Lyons* vs. *State, supra,* Chief Judge Hill, said:

"In some jurisdictions it has been held that this right of the defendant to be present during the trial and until the rendition of the verdict could not be waived at all, either by himself or by his counsel. But in this State the defendant can waive any right guaranteed to him by the law or the Constitution, and it has also been held that a defendant who is out on bond can constructively waive his right to be present at any stage of the trial. It is admitted in this case that the defendant was in jail, that he was not present when the verdict was rendered, and that he personally did not waive his right to be present. It is, however, contended that his counsel waived this right for him. Whether his counsel had the right to make any waiver of the defendant's presence is to the writer a very serious question. There is weighty authority for the statement that a waiver of this right must be the act of the accused himself, and

not that of his counsel. *People* vs. *Perkins, 1 Wend. 91; Rex.* vs. *Streak, 2 Car. & P. 413; Rose* vs. *State, 20 Ohio, 31; Young* vs. *State, 39 Ala. 357; Prine* vs. *Com. 18 Pa. 103.* In this last case the learned Chief Justice uses the following strong language: 'What authority had the prisoner's counsel in this case to waive the defendant's presence on the pretext of convenience? In a criminal case there is no warrant of attorney, actual or potential. It is unnecessary, however, to speak of delegated authority, for the right of a prisoner to be present at his trial is inherent and inalienable.'

"If it be said that counsel for the prisoner in this case had the right to waive his own presence at the rendition of the verdict, and also the right to waive the polling of the jury, can it be claimed that he had the right to do this much in the absence of his client, and without the express authority of his client to make such waiver? The prisoner had the right to have his attorney present at the rendition of the verdict. This it seems to me is a right which not the attorney, but the client alone, can waive. Of course, it is generally, the practice, where both counsel and client are present in court on the trial of criminal cases, for many important rights of the client to be waived by counsel. But we do not think that in the trial of a criminal case the waiver of an attorney of his right to be present at the rendition of the verdict is binding upon his client. The man on trial has not only the right to be present in person, but to have his counsel present."

Decisions of This Court.

This question has been most effectively considered by this Court.

Thus, in *Hopt* vs. *Utah, 110 U. S. 579,* Mr. Justice Harlan said:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense

with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, not by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. *The public has an interest in his life and liberty.* Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiration or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substituted rights may be affected by the proceedings against him. *If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.*"

This passage was cited with approval in *Schwab* vs. *Berggren, 143 U. S. 449;* and also in *Lewis* vs. *United States 146 U. S. 373,* where Mr. Justice Shiras, in support of the contention that the right

to be personally present during the trial cannot be waived in cases of felony, further said:

"'It would be contrary to the dictates of humanity to let him waive the advantage which a view of his said plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence.' *Prine* vs. *Commonwealth, 18 Pa. St. 103, 104,* per Gibson, C. J. And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact. Thus, in a Virginia case, *Hooker* vs. *Commonwealth, 13 Gratt. 763, 766,* the court observed that the record showed that, on two occasions during the trial, the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court either day, and added, 'This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. * * * It is the right of any one, when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses,' and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.' Thereupon the judgment was reversed. And in the case of *Dunn* vs. *Commonwealth, 6 Pa. St. 384,* it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. *Ball* vs. *United States, 140 U. S. 118* is to the same effect."

In *Thompson* vs. *Utah, 170 U. S. 343,* a similar question arose *i. e.,* as to whether it was in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon his guilt, in-

stead of a constitutional jury of twelve. Dealing with this proposition, Mr. Justice Harlan said:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt* vs. *Utah*, above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence."

The opinion then quotes at length the passage from *Hopt vs. Utah* which we have cited above.

In *Kepner* v. *United States, 195 U. S. 100, 135,* Mr. Justice Holmes, in a dissenting opinion in which Justices White and McKenna concurred, said:

"*In a capital case, like Hopt* v. *People, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights.. Thompson* v. *Utah, 170 U. S. 343, 353, 354.* Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

To the same effect are *Cancemi* vs. *People, 18 N. Y. 128,* and *Ball* vs. *United States, 140 U. S. 118.*

In the first of these cases, which is a leading authority in this country, it was decided that a prisoner on trial for a capital offense could not consent to be tried by a jury of eleven. The reasoning of Judge Strong, which has been frequently quoted, is very much in point here:

"The penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law' (Const. art. 1, sec 6), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: 'The king has an interest in the preservation of all his subjects.' And again (vol. 1, 133), that the 'natural life, being the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to vari-

ous matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and the whole which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant. Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any member short of a full panel of twelve jurors, and we think it ought not to be tolerated."

To the same effect is, *Dickinson* vs. *United States, 159 Fed. Rep. 801.*

Two facts are to be emphasized in this aspect of the case:

1. The appellant was not at large on bail. He could not come and go as he pleased. The circumstances were not such as existed in *Diaz* vs. *U. S.* (*supra*), or in *Barton* vs. *State*, (*supra*). He was lodged in jail and was not a free moral agent. He could not act upon his own initiative, with respect to his attendance upon his trial. He could not even enter the court-room except with the permission and at the instance of the Court. Without the exercise of its volition that he should be present, his entire trial would have proceeded *in absentia*. His absence at the reception of the verdict, the polling of the jury, and its discharge was therefore the direct result of judicial action. In fact it was because of the positive request of the Court that his counsel, without authority, waived his presence to the extent desired. They might as well, on like request, have waived his presence during the entire trial. The legal situation and effect would have been precisely the same.

2. Not only was the appellant's absence involtary, so far as any act or consent of his was concerned, but the consent of his counsel was coerced by the action of the presiding judge, who yielded to the terror inspired by the mob, which dominated the trial, and who confessed his inability to withstand its anticipated violence. Their consent was, therefore, not only without authority express or implied, but was wrested from them by duress equivalent to the application of the thumb-screw and the rack. The authorities cited under Point II, as well as every principle of justice and humanity, condemn such an act as a nullity.

IV.

It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel.

In all of the cases cited under Point III (and many more might be added from various jurisdictions), the Courts proceeded on the theory that the right of the prisoner to be present at every stage of the trial, including the rendition of the verdict, was of such a nature as not only to concern him, but the public and the cause of justice as well, and that, however specific may be the terms of a waiver by one charged with a capital offense, who, at the time of his trial is incarcerated, such consent would be an absolute nullity. In some cases, particularly *Thompson* vs. *Utah, 170 U. S. 343,* it was said that it was not within the power of one so accused to consent to the withholding of his constitutional right either expressly or by his *silence.*

Ratification at most is merely the equivalent of prior authority. Authority from a principal to an agent cannot be more effective under the law than the act of the principal himself. Consequently, by ratifying the unauthorized act of an agent, the principal is merely doing an act which he might

have performed in the first instance. If, therefore he could not in the first instance have waived a right, a thousand attempted ratifications by him of an unauthorized waiver by his agent cannot give validity to the waiver, or impart legality to a nullity.

So, too, acquiescence can only operate in the sense of a prior consent or authority. It is not in legal intendment more potent than was the silence considered in *Thompson* vs. *Utah, supra.* If, therefore, Frank had a constitutional right to be present at the time of the rendition of the verdict in his case, which he could not waive, that right is not affected either by the authorized or unauthorized consent of his attorneys to the reception of the verdict in his absence, or by his ratification of their attempted waiver, or by his apparent acquiescence therein. His constitutional right, protective of his life and liberty, survives any express or implied consent or waiver by him, in whatsoever form, or by whatever method such waiver is sought to be spelled out.

It should not be overlooked that although the Supreme Court of Georgia in its opinion (*Rec. p. 22*) refers to the absence of Frank, when the verdict was received, as "a mere incident of the trial," according to the authorities which we have cited, this is a grave misconception. His absence did not constitute an irregularity. It created a nullity. It affected the jurisdiction of the Court. It amounted to a fundamental vice in the proceedings. It was no more "a mere incident" of the trial than the right to be heard is a mere incident in any cause, civil or criminal. Upon his presence depended the right of the court to render a judgment which involved the taking of his life, or lib-

erty. When the verdict was received in his absence the jurisdiction of the Court over him, previously existing and to pronounce judgment against him was lost. Thenceforth the case was *coram non judice.* Consequently, although an irregularity might have been waived by Frank, or the waiver of an irregularity by his authorized attorneys might have been ratified or acquiesced in, by him, he could not ratify or acquiesce in an act absolutely null and void to which he himself could not have given vitality.

V.

If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, whch could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment as a nullity.

The converse of the proposition is that Frank is estopped from questioning the legality of the judgment. In other words, it must be claimed that though jurisdiction may not be conferred by consent, it may be, by means of an estoppel. This we deny.

Moreover, there is no basis for predicating the claim of estoppel on the fact that the jurisdictional question was not raised on the motion for a new trial. The State has not been injured thereby. It has not changed its position because of the procedure adopted. The verdict had been received, the jury discharged and Frank sentenced, before he knew of the facts which nullified the verdict. The State could not thereafter, by anything that it could do, alter the situation or impart validity to a proceeding which had become a nullity. The verdict was void and avoided the trial, not because of anything that Frank did, but because of the act of the State in disregarding his constitutional right.

When, therefore, in its opinion, the Supreme Court of Georgia, sought to sustain the validity of a nullity, by regarding it as a mere irregularity or error, and treats the procedure adopted on Frank's behalf as an acquiescence in such irregularity, and as operating by way of an estoppel against him, it is merely an attempt on its part to interpret the Fourteenth Amendment, by virtually deciding that Frank's absence at the time of the rendition of the verdict, was not an invasion of the due process clause, that in any event his absence could be waived, and that it was in fact waived by the failure of his attorneys to urge the nullity of the judgment when they moved for a new trial. That would prove to be a new method of overcoming an inherent jurisdictional defect in a judgment and of depriving one whose life is sought to be taken from him without due process of law of having his constitutional right vindicated by this court.

VI.

Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned, can be raised, then, we contend, that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an ex post facto law.

In view of the history of Georgia procedure, the decision rendered by the State Supreme Court on the application to set aside the verdict was the equivalent of a new law, for the first time adopted, regulating the remedy in a case of constitutional infraction resulting in the nullity of a verdict. Were the decision regarded as holding that a motion for a new trial is the only remedy by which to seek relief in such a case, it would be the first announcement of such a rule by that Court. The most that can be said is that heretofore similar questions have been raised on motions for a new trial, without objection. But hitherto every adjudged case has been to the effect that a motion to set aside the verdict is a proper remedy, and in *Nolan* vs. *State, supra,* and *Lyons* vs. *State, supra,* it was decided that it was *the* proper remedy. Frank relied upon this unbroken line of precedents, the soundness of which had

never been questioned, and had always been recognized. *Rawlins* vs. *Mitchell, 127 Ga. 24.*

This subject will receive further consideration under Point VIII.

If, therefore, the Supreme Court of Georgia, by a sudden departure from its previous decisions, relied upon by him, could deprive him of his right to raise the constitutional question which we have so exhaustively discussed, that decision would in itself not only amount to an infraction of the due process clause of the Constitution, but it would also violate Article I, Section 10 of the Constitution, which prohibits the passing of an *ex post facto* law.

In *Hopt* vs. *Utah, supra,* Mr. Justice Harlan expressly decided that a statute that takes from the accused a substantial right given to him by a law in force at the time to which his guilt relates, would be *ex post facto* in its effect and operation, and that legislation of that kind cannot be sustained, simply because in a general sense it may be said to regulate procedure. "The difficulty is not so much," says Mr. Justice Harlan, "as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes in their operation take from the accused any right that was regarded at the time of the adoption of the statute as vital for the protection of life and liberty and which he enjoyed at the time of the commission of the offense charged against him".

If a court could turn its face upon its previous precedents in a matter so vital as that which we are now considering, then one accused of crime who, as Frank did in the present case, relies upon

such precedents, would be caught like a rat in a trap.

Under the law of Georgia, a unanimous decision of its Supreme Court has the force of a statute until it has been reversed by a full bench after argument on a request for review granted by the Court.

By the *Laws of Georgia, Acts of 1858, p. 74* (embodied in *Georgia Code* of *1882 as § 217*), referring to the Supreme Court, it is provided:

"A decision concurred in by three judges cannot be reversed or materially changed except by a full bench, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument the court, in its decision, shall state distinctly whether it affirms, reverses or changes such decision."

Under this act, it was held that the decision of the full bench was converted into a statute, and that a unanimous decision of the Supreme Court is as binding as an act of the Legislature. (*28 Ga. 597; 30 Ga. 202; 59 Ga. 54.*)

The *Code of Georgia of 1910, § 6207,* provides:

"A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argu-

ment, the court, in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

The precedents from the Supreme Court of Georgia to which we have referred were unanimous decisions of that court.

In this respect the case comes within the principle laid down in *Muhlker* vs. *N. Y. & H. R. Co., 197 U. S. 544,* where this Court assumed jurisdiction to reverse a judgment of the Supreme Court of New York, *in error to that court,* because the latter had departed from a line of decisions which were regarded as constituting a rule of property. Although that case involved the "impairment of contract clause", it is believed that the application of the same principle to a case arising under "the due process clause" is founded on equally sound principles of constitutional law.

But irrespective of the considerations which we have thus far discussed under this point, we again urge that in effect the decision actually rendered proceeded on the theory that the course of procedure adopted by Frank, because of his non-action, his failure to raise the constitutional and jurisdictional question at the first opportunity, operated as a waiver of his constitutional right. This view we have sought to show is opposed to the decisions of this Court.

VII.

It follows from the propositions thus far discussed that appellant's application for a writ of habeas corpus is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him the Court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making habeas corpus the proper remedy to test the validity of his detention thereunder.

We concede that a writ of habeas corpus can not be made to perform the office of a writ of error. Irregularities and erroneous rulings on the trial, however egregious, are not reviewable by *habeas corpus.* But it is equally clear, that where the judgment under which a prisoner is detained, lacks jurisdiction in the court which pronounced it, whether wanting *ab initio* or lost in the course of the proceedings against him, it is a nullity, the pronouncement is unlawful, and the writ of *habeas corpus* is the indicated remedy for relief from the unlawful imprisonment.

Section 751 of the United States Revised Statutes provides:

"The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus."

Section 752 declares:

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty."

Section 753 continues:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the Constitution or of a law or treaty of the United States."

Sections 754-756 of the United States Revised Statutes regulate the procedure on such an application.

As we have already shown, in the present case our contention is, that the appellant is in custody in violation of the Constitution of the United States, in that the rendition of a judgment condemning him to death, based on a verdict received in his absence, is not due process of law.

As indicating the distinction between cases which deal with mere irregularities and those which involve an absolute nullity, the opinion in *Matter of Hans Nielsen, 131 U. S. 176,* is most valuable. That case came here on an appeal from a final order of the District Court of Utah Territory, which denied an application for a writ of *habeas corpus.* The petitioner had been twice indicted, once for unlawful cohabitation, and once for adultery. He pleaded guilty to the first of the indictments, and was fined. He was then arraigned on the indictment for adultery and pleaded that he had already been convicted of the offense charged, by his plea of guilty to the first indict-

ment. He was nevertheless convicted and sentenced to imprisonment. He then sued out a writ of *habeas corpus*, on the ground that the court was without authority to impose sentence upon him, because by doing so he had been denied a constitutional right. This Court sustained his contention, reversing the judgment of the District Court. In the course of his opinion Mr. Justice Bradley said:

"The first question to be considered is, whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by *habeas corpus*. The objection to the remedy of *habeas corpus*, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on *habeas corpus*. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstituional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the case of *Ex parte Lange, 18 Wall. 163*, and *Ex parte Siebold, 100 U. S. 371*, and in several other cases referred to therein. In the case of *In re Snow, 120 U. S. 274*, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of

the District Court of Utah, and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. In that case, the *habeas corpus* was applied for at a term subsequent to that at which the judgment was rendered; but we did not regard this circumstance as sufficient to prevent the prisoner from having his remedy by that writ.

"It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the *face* of the judgment; but if it appears in the indictment, or anywhere else in the record, of which the judgment is only a part, it is sufficient. In the present case it appeared in the record in the plea of *autre fois* convict, which was admitted to be true by the demurrer of the Government. We think that this was sufficient. It was laid down by this court in *In re Coy, 127 U. S. 731, 758*, that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him'; referring to *Ex parte Siebold, 100 U. S. 371.*

"In the present case, it is true, the ground for the *habeas corpus* was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a

valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange*, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow; the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold, 100 U. S. 371, 375*, and is illustrated by the case of *Ex parte Parks*, as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte Parks, 93 U. S. 18, 22*, 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail *in favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly

be stated with more categorical accuracy than it is in the opening sentence of *Ex parte Wilson, 114 U. S. 417, 420,* where Mr. Justice Gray, speaking for the court, said: 'It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jursdiction of that court, or there is no authority to hold him under the sentence.' This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the Circuit and District courts; but, with regard to the power of discharging on *habeas corpus,* it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

Without quoting from it, attention is directed to the decision in *Ex parte Bain, 121 U. S. 1,* especially to the reasoning on pages 13 and 14 of the opinion; also to the various cases which are cited in the opinion of Mr. Justice Bradley (*supra*).

In re Bonner, 151 U. S. 242, 256, Mr. Justice Field, in support of the granting of a writ of *habeas corpus,* said:

"We are * * * of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its au-

thority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced. Then comes the mode of the presentation of the offense to the court. That is specifically prescribed. If the offense be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin v. United States, 117 U. S. 348,* the accusation may be made by indictment of the grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offense, with such particulars as to time, place, and attendant circumstances as will

apprize him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way. When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict—and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character or other attending circumstances. Death might be inflicted by torture, or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible, if the doctrine asserted by him can be maintained.

Although at first blush they may appear to be cases against us, in reality, the decisions in *Felts* v. *Murphy, 201 U. S. 123* and *Valentina* v. *Mercer, 201 U. S. 131,* are strongly in our favor.

The first of them was an appeal from the Circuit Court of the United States for the Northern District of Illinois, where the petitioner, who had been convicted of murder in the State court, sought to be discharged on *habeas corpus* on the ground that he was so deaf that he could not hear the proceedings on his trial, and that therefore he was deprived of his liberty without due process of law. The court recognized the doctrine in the *Nielsen case,* and distinguished it, by pointing out that in the case under consideration the trial court had at most been guilty of a mere irregularity, hence there was no question of the absense or loss of jurisdiction. Mr. Justice Peckham said, after stating the grounds urged on behalf of the petitioner:

"But upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial *and if it continued all through,* then the application for the writ was properly denied by the Circuit Court, and its order must be affirmed. The writ cannot perform the function of a writ of error."

It is important to note this qualification: "If it (jurisdiction) continued all through." It is our contention that in our case jurisdiction ceased when the appellant was kept out of court at the time of the reception of the verdict and when the domination of the trial by the mob became effective. Although jurisdiction over him and of the cause existed up to that time, it did not con-

tinue all through the trial, but was lost, and he was deprived of his day in court.

In *Valentina* v. *Mercer* (*supra*), which came to this Court on appeal from a denial by the Circuit Court of the United States for the District of New Jersey, of a suit of *habeas corpus* after the prisoner had been convicted of murder in the State court of New Jersey, it was claimed that the prisoner was deprived of a constitutional right, of a very shadowy character, founded on the phraseology of the charge addressed by the trial court to the jury. Here, too, Judge Peckham said:

"Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the State court had jurisdiction to try the case, and had jurisdiction over the person of the accused, *and never lost such jurisdiction*, the Federal Circuit Court was right in denying the application of the petitioner for a writ, and its order must be affirmed."

In *Rogers* v. *Peck, 199 U. S. 425*, which was also brought here on an appeal from a denial of a writ of *habeas corpus* by the District Court of the United States for the District of Vermont, by which relief was sought from a judgment of conviction rendered in the State Court of Vermont, Mr. Justice Day said:

"The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. *It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that*

such interference is warranted." (Citing various cases.)

Nowhere has the principle for which we contend been more clearly stated than it was by Mr. Justice Bradley in *Ex parte Bridges, 2 Woods 428, s. c. 4 Fed. Cas. 105, 106.* There Bridges, who was confined in the Georgia State Penitentiary on a conviction in the Superior Court of Randolph County, Georgia, upon an indictment for perjury committed in the course of a judicial investigation conducted under authority of Congress, petitioned for a writ of *habeas corpus* on the ground that the offense was against the public justice of the United States and was exclusively cognizable in the Federal Courts. His contention was sustained, and in the course of his opinion that great jurist said:

"The court had no jurisdiction of the case. The proceedings were null and void. It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the supreme court of the United States, and that it is too late for a *habeas corpus* to issue from a federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange, 18 Wall (85 U. S.) 163.* As a general rule, when it appears by a return to a habeas corpus that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after a conviction, he will be at once returned into custody, it being presumed that the court having

such custody has examined, or will examine and lawfully determine the case; and, at all events, that its judgment will be subject to such regular proceedings for review as is provided by law.

"In addition to this cautionary and conservative rule of the common law, the fourteenth section of the judiciary act of 1789 provided that the writ should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought into court to testify. *1 Stat. 82.* This provision prevented its application to persons imprisoned under state process. (But the general rule does not apply where the order of commitment is made by tribunal or officer having no jurisdiction to make it; and the proviso of the 14th section of the judiciary act has been greatly modified.) The benefit of the writ may now be had by prisoners in jail, not only when in custody under authority of the United States, but in 1833, when the nullification proceedings were adopted in South Carolina, it was extended to those in custody for an act done in pursuance of a law of the United States, or of a judgment of any of its courts. *4 Stat. 634.* The primary object of this statute was to protect the revenue officers in carrying out the acts of congress. In 1842, when the complications growing out of the McLeod Case, and the Canada rebellion occurred, it was extended to foreigners acting under the authority and sanction of their own government. *5 Stat. 539.* This was to prevent a single state, as was done by New York in that case, from interfering with our foreign relations.

"In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, congress, by the act of February 5, 1867, extended the writ to 'all cases where any person may be restrained of his or her liberty

in violation of the constitution, or of any treaty or law of the United States,' and made it issuable by 'the several courts of the United States, and the several justices and judges of said courts within their respective jurisdiction.' *14 Stat. 385.* The present case clearly belongs to the last category. The relator was certainly 'restrained of his liberty in violation of a law of the United States.' And although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus,* there seems to be no escape from the law. If it were a case in which the state court had *jurisdiction* of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, *the state court had not jurisdiction of the offense.*"

In *McClaughry* v. *Deming, 186 U. S. 49,* Mr. Justice Peckham cited with approval from the opinion in *Oakley* v. *Aspinwall, 3 N. Y. 547,* the following, in support of a decision sustaining a proceeding in habeas corpus on the ground of the illegality of a trial by court martial:

"It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion. But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibition of a law—which was not designed

merely for the protection of a party to a suit, but for the general interests of justice."

In *Kaizo* v. *Henry, 211 U. S. 146,* referring to the contention that eight members of the grand jury which indicted the prisoner were disqualified, the effort being to raise that objection by writ of habeas corpus, Mr. Justice Moody said:

"But we find no occasion to decide or consider this question. If the plaintiff in error desired the judgment of this court upon it he should have brought a writ of error to the judgment of the Supreme Court of the Territory which passed upon it in affirming the judgment of conviction in the trial court. He may not lie by, as he did in this case, until the time for the execution of the judgment comes near, and then seek to raise collaterally, by habeas corpus, *questions not affecting the jurisdiction of the court which convicted him,* which were open to him in the original case, and, if properly presented then, could ultimately have come to this court on writ of error. *Unquestionably if the trial court had exceeded its jurisdiction a prisoner held under its judgment might be discharged from custody upon a writ of habeas corpus by another court having the authority to entertain the writ, Ex parte Lange, 18 Wall. 163; Ex parte Siebold, 100 U. S. 371; Ex parte Yarbrough, 110 U. S. 651; Ex parte Wilson, 114 U. S. 417;* * * * But no court may properly release a prisoner under conviction and sentence of another court, *unless for want of jurisdiction of the cause or person,* or for some other matter rendering its proceedings void. * * * Disqualification of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case."

In *Harlan* v. *McGourin, 218 U. S. 442,* Mr. Justice Day said:

"The learned counsel for the appellants rely upon a number of cases which are said to warrant the court in habeas corpus proceedings in examining the bill of exceptions with a view to determining such matters as are herein presented. But an examination of these cases will show that where collateral attacks have been sustained through the medium of a writ of habeas corpus, *the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void.* * * * No objection is made to the constitutionality of the statute or the right and authority of the court to consider and determine the guilt or innocence of the accused, and for that purpose to weigh and determine the effect of the testimony offered. The contention is that in the respects pointed out the testimony wholly fails to support the charge. *The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.*"

In the recent case of *Stevens* v. *McClaughry, 207 Fed. Rep. 18,* decided by the Circuit Court of Appeals of the Eighth Circuit, it was held that the proper Federal Court may release by writ of habeas corpus one who is being restrained of his liberty by virtue of a judgment of a Federal Court beyond its jurisdiction, and therefore void, and that one who has been restrained of his liberty for many years by virtue of the judgment of

a court which is beyond its jurisdiction and void, is not barred from a release therefrom by writ of habeas corpus *by the fact that he might have secured sucs relief by a writ of error but failed to apply for it until it was too late.*

The opinion of Judge Sanborn is luminous, and, as we believe, applies to the facts of this case in all of its phases. It is especially valuable for its discussion of the opinion in *Matter of Spencer, 228 U. S. 652,* which is clearly shown not to be applicable to a case like the present. His summary is admirably expressed (*pp. 28 and 29*):

"And here is the true distinction between the cases in which the writ of *habeas corpus* may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of Snow and Nielsen and the case at bar is complete, and unless the decision in the case of Spencer and others [*228 U. S. 652*] has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in *In re Mayfield, 141 U. S. 107, 116, 11 Sup. Ct. 939, 35 L. Ed. 635; In re Ladd, C. C. 74 Fed. 31, 42; In re Waite, D. C., 81 Fed. 359, 362, 372; Mackey* v. *Miller, 126 Fed. 161, 163, 62 C. C. A. 139; Ex parte Peeke, D. C., 144 Fed. 1016*—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that every one restrained of his liberty by a void judgment which he might have challenged by writ of error, is barred of relief by means of the writ of

habeas corpus. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the Lange Case, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of *habeas corpus* because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late is to rob the writ of the very purpose of its existence, the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in *Ex parte Lange, 18 Wall., at page 176, 21 L. Ed. 872,* that one who should be sentenced by a justice of the peace having jurisdiction to fine for a misdemeanor, or by a court of general jurisdiction, on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of *habeas corpus.*"

After all, assuming that a constitutional right guaranteed by the Fourteenth Amendment has been infringed, by the action of a state court, in such a manner as to deprive it of jurisdiction to render a judgment which deprives a citizen of his life or his liberty, and relief has been sought in vain in the state court, and the right of review here by writ of error has been prevented, it has not presented a case, to which the pointed language of Mr. Justice Holmes in *Rogers* v. *Alabama, 192 U. S. 226, 230,* is applicable:

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank* v. *Skelly, 1 Black, 436, 443.* But that is merely an illustration of a more general rule. On the same ground there can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the findings, this court would enforce the constitutional requirement. See *German Savings & Loan Society* v. *Dormitzer, 192 U. S. 125.*"

VIII.

The appellant had, before applying for a writ of habeas corpus, exhausted all of his remedies in the State courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this Court has pointed out as controlling in like cases.

We are aware of the decisions of this Court which seek to regulate the issuance of writs of

habeas corpus, in original proceedings here, as well as in the United States District Courts, where the validity of criminal proceedings in a State court is sought to be questioned. The effect of these decisions is that, ordinarily, one applying for the writ of *habeas corpus* to a Federal court, in such a case, must first exhaust his remedies in the State court, and, if a Federal question is involved, by seeking to review the judgment of the State court, in this tribunal by writ of error.

When, however, all of the remedies in the State court, and by writ of error in this Court, have been exhausted, and a right guaranteed by the Federal Constitution has been violated by a State court, to such an extent as to nullify the proceedings of that court and to deprive it of jurisdiction, the sacred writ of *habeas corpus,* preserved even from suspension, except in cases of rebellion or invasion, by Article I, Section 9, paragraph 2, of the Federal Constitution, may still be successfully invoked. This must especially be true, when the right to due process of law derived directly from the Federal Constitution is the basis of the petitioner's contention.

In the enforcement of this right, the exercise of the undoubted jurisdiction of the courts of the United States cannot be made dependent upon the action of the State tribunals, denying the constitutional right asserted or on their refusal to determine it, because of rules of practice adopted or laid down by them. Otherwise they might, in defiance of the Federal judiciary, nullify the Federal Constitution, or neutralize the power of the Federal courts to enforce it, as against its infraction by State agencies, whether executive, legislative or judicial.

While it may well be conceded, from considerations of comity, (*a*) that the Federal courts ought not to issue the writ of *habeas corpus* in advance of trial in the State courts, and (*b*) that after conviction they ought not to issue such a writ, save in exceptional circumstances, until the right of appeal in the State courts has been exhausted, and although it may further be conceded (*c*) that for reasons of convenience, where proceedings in error to review the action of the State courts by this Court are allowed, the writ of *habeas corpus* should not ordinarily issue until the right of review here has been likewise exhausted, yet, where all of these normal modes of procedure have been followed, or where resort to the normal remedies has been denied, or has been lost through misconception, inadvertence, or even ignorance, it would be revolutionary to hold, that a substantive right, grounded on the Federal Constitution, and determinative of the jurisdiction of a State Court, can be disregarded by this Court, simply because the petitioner for a writ of *habeas corpus,* by means of which his constitutional right is sought to be vindicated, might, on some previous occasion, have resorted to another or more usual method for the adjudication of his rights. If no other way is open to him *now,* the door should not be closed upon him because, by the exercise of greater prescience or the possession of an infallible judgment, he might have avoided the necessity of resorting to the Federal courts for relief by means of the writ of *habeas corpus.*

This contention is, we believe, in strict accordance with *Ex parte Royall, 117 U. S. 241,* and the long line of cases which have followed it. It was there expressly held, that the courts of the United

States have jurisdiction on *habeas corpus* to discharge from custody a person who is restrained of his liberty in violation of the Constitution of the United States, but who at the time is held under State process for trial on an indictment charging him with an offense against the laws of the United States. It was, however, declared, out of considerations of comity, that when a person is in custody under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, a court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion is subordinated to special circumstances requiring immediate action. After the conviction of the accused in the State court, the Federal court has still a discretion whether he shall be put to his writ of error to the highest court of the State, or whether it will proceed by writ of *habeas corpus* summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States. Although in that case the writ of *habeas corpus* was withheld because the petitioner had not exhausted his other remedies, in concluding his opinion Mr. Justice Harlan said:

"As it does not appear that the Circuit Court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, *but without prejudice to the right of the petitioner* to renew his applications to that court

at some future time should the circumstances render it proper to do so."

In *Ex parte Charles W. Fonda, 117 U. S. 516,* Mr. Chief Justice Waite, said:

"This motion is denied on the authority of *Ex parte Royall.* No reason is suggested why the Supreme Court of the State may not review the judgment of the circuit court of the county, upon the question which is raised as to the application of the statute, under which the conviction has been had, to embezzlements by the servants and clerks of national banks; nor why it should not be permitted to do so without interference by the courts of the United States. *The question appears to be one which, if properly presented by the record, may be reviewed in this court after a decision by the supreme court adverse to the petitioner. The case as made by the motion papers is not one which, under the principles settled in Royall's Case, requires this Court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error.*"

In *Wood v. Brush, 140 U. S. 278,* Mr. Justice Harlan said, in part:

"Whether the appellant might not have availed himself, in other modes, and during the trial, of the objection now under consideration, we need not inquire; for, independently of the view we have expressed, and even if there were some room for a different construction of the New York Code, *the Circuit Court might well have forborne to act until this question had been definitely determined, either in the highest court of New York, or in this court upon a writ of error sued out by the appellant.* While the courts of the United States have power, upon *habeas corpus,* to inquire into the cause of the detention of anyone claiming to be

restrained of his liberty in violation of the Constitution, or laws, or treaties of the United States, it was not intended by Congress that they should by writs of *habeas corpus* obstruct the ordinary administration of the criminal laws of the States, through their own tribunals. 'Where', this court said in *Ex parte Royall, 117 U. S. 241, 252, 253,* 'a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus,* in advance of his trial in the court in which is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus,* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. *And we will add, that after the final disposition of the case by the highest court of the State, the circuit court, in its discretion, may put the party who has been denied a right, privilege or immunity claimed under the Constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of habeas corpus.* These principles have special application where, as in the present case, there is no pretense that the Statute under which the prosecution of the appellant was conducted is repugnant to the Constitution or laws of the United States."

In *Cook* v. *Hart, 146 U. S. 183,* Mr. Justice Brown said in concluding:

"While the power to issue writs of *habeas corpus* to state courts which are proceeding in disregard of rights secured by the Constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waived no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. *Should such rights be denied, his remedy in the Federal court will remain unimpaired.* So far from there being special circumstances in this case to show that the Federal court ought to interfere, the fact that, with ample opportunity to do so, he did not apply for this writ until after the jury had been sworn and his trial begun in the state court, is of itself a special circumstance to indicate that the Federal court should not interpose at this time."

In *Ex parte Frederich, 149 U. S. 70,* Mr. Justice Jackson said in concluding:

"It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes than to award him a writ of *habeas corpus.* For, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the Federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him

thereafter, within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged.

In some instances, as in *Re Medley, 134 U. S. 160*, the proceeding by *habeas corpus* has been entertained, although a writ of error could be prosecuted; but the general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a State court violates his rights under the Constitution or laws of the United States to *seek* a review thereof by writ of error instead of resorting to the writ of *habeas corpus.*

"In the present case we agree with the court below that the petitioner had open to him *the remedy by writ of error from this court* for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy rather than given the remedy by writ of *habeas corpus.* The circuit court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances.

"Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the code under which the supreme court proceeded in disposing of the case, when it was before it, or upon the question of the validity of the judgments rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the circuit court refusing the application for the writ of *habeas corpus* was correct, and it is accordingly affirmed."

In *New York* v. *Eno, 155 U. S. 89, 95,* Mr. Justice Harlan said in part as follows:

"This court denied the application upon the authority of *Ex parte Royall,* observing that no reason had been suggested why the supreme court of the state might not review the judgment of the inferior state court upon the question as to the application of the statute under which the conviction was had to embezzlement by the servants and clerks of national banks, nor why it should not be permitted to do so without interference by the courts of the United States; that the question appeared to be one which, *if properly presented by the record, might* be reviewed in this court after a decision by the supreme court of state adverse to the petitioner."

In *Pepke* v. *Cronan, 155 U. S. 100,* Mr. Chief Justice Fuller said:

"It is insisted upon the argument that the judgment in contempt was not appealable (*State* v. *Davis, 2 N. D. 461*) but it was conceded that the validity of the law and the sentence could be contested by the supreme court of the state on *certiorari* or *habeas corpus* and no reason was suggested why, if the judgment of the district court was the final judgment of the highest court of the state in which a decision in the matter could be had, a writ of error from this court might not be applied for.

"Without considering the merits of the questions discussed, the judgment must be affirmed upon the authority above stated."

In *Re Chapman, 156 U. S. 211,* Mr. Chief Justice Fuller said in concluding:

"In the case before us, the question as to the jurisdiction of the Supreme Court of the District

of Columbia has indeed already been passed upon by that court and also by the court of appeals, upon a demurrer to the indictment, but the case has not gone to final judgment in either court, and what the result of a trial may be cannot be assumed. We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired *until* the conclusion of the procedings. If judgment goes against petitioner and is affirmed by the court of appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. *If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus.* We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the district upon the merits of the case before them."

In *Whitten* v. *Tomlinson, 160 U. S. 231,* Mr. Justice Gray said:

"But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus in advance* of a final determination of his case of the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court."

In *Baker* v. *Grice, 169 U. S. 284,* Mr. Justice Peckham said:

"If this application had been made *subsequently* to a trial of the petitioner in the state court and his conviction upon such trial under a holding by that court that the law was constitutional, and

where an appeal from such judgment of conviction merely imposing a fine could not be had, excepting upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, *a different question would be presented* and one which is not decided in this case, and upon which we do not now express any opinion."

In *Tinsley* v. *Anderson, 171 U. S. 101,* Mr. Chief Justice Fuller said:

"The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the circuit courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint or liberty of any person in custody under the authority of a state in violation of the Constitution, a law or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person *in advance* of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court."

In *Fitts v. McGhee, 172 U. S. 516,* Mr. Justice Harland said:

"Further, even if the Circuit Court regarded the act of 1895 as repugnant to the Constitution of the United States, the custody of the accused by the state authorities should not have been disturbed by any order of that court, and the accused should have been left to be dealt with by the state court, with the right, after the determination of the case in that court, to prosecute a writ of error from this court for the re-examination of the final judgment so far as it involved

any privileges secured to the accused by the Constitution of the United States."

In *Markuson* v. *Boucher, 175 U. S. 184,* Mr. Justice McKenna, concluding, said:

"The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons. *Nor does the question arise what right appellant would have had to petition relief from the District Court if his remedies against the judgment of the state court had ceased to exist.*"

In *Minnesota* v. *Brundage, 180 U. S. 499,* Mr. Justice Harlan, concluding, said:

"Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus, without prejudice to a renewal* of it when the appellee shall have exhausted the remedies provided by the State for a review of the judgment of the Municipal Court of Minneapolis."

In *Urquhart* v. *Brown, 205 U. S. 179,* the right of the Federal court to determine the jurisdiction of a State court in a criminal case by writ of *habeas corpus* was recognized, Mr. Justice Harlan saying:

"It is the settled doctrine of this court that although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon *habeas corpus,* one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice or judge has a discretion *as to the time and*

mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several States, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under State authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. *After the highest court of the State, competent under the State law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination.* The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus in advance of final action by the authorities of the State* are those of great urgency that require to be promptly disposed of," etc.

In *Glasgow* v. *Moyer, 225 U. S. 420,* Mr. Justice McKenna said, in part:

"Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, *he not having availed himself of the remedy,* to permit him to prosecute *habeas corpus.* The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue; in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found; and, if the decision was against him, test its correctness through the proper appellate tribunals."

There is nothing in *Ex parte Spencer, 228 U. S. 652,* which militates against the appellant's right to maintain these proceedings, or which disturbs the doctrine recognized in the cases above cited, that after the exhaustion of remedies in the State

court and by an effort to review their determination in this Court, the Federal courts will by writ of *habeas corpus* in a proper case, determine a jurisdictional question based upon one of the rights guaranteed by the Federal Constitution. That was an original motion in this Court, for leave to file an application for a writ of *habeas corpus* to investigate the legality of a sentence imposed by the Pennsylvania Court of Quarter Sessions under the Indeterminate Sentence Act. After sentence the petitioner had taken an appeal to the Superior Court of Pennsylvania, where the sentence was affirmed. Subsequently he presented a petition to the Supreme Court of the State praying for an allowance of the right to appeal, but that petition was refused. In neither court was the question of the constitutionality of the Pennsylvania act under which the sentence was imposed, raised, nor was any constitutional question presented. The petitioner subsequently sought, by *habeas corpus* in the State court and in the United States District Court, to litigate the legality of his sentence, but both petitions were refused. It was pointed out that the petitioner had ample opportunity to avail himself of the objections to the validity of his sentence, but failed to do so, and that the circumstances of the case were not of so exceptional a nature as to call for interference by *habeas corpus*.

This Court also held, that where, as in Pennsylvania, the judgment of a trial court in criminal cases is subject to modification, as well as affirmance or reversal, by the appellate court, and a sentence partly legal and illegal under the State law can be modified by striking therefrom the illegal part, such sentence is erroneous and not

void, and that consequently this Court will not on *habeas corpus* pass upon the question of the legality of the part of the sentence complained of, the proper remedy being to review the judgment on appeal.

It was also decided that it was not the duty of this Court to question the decision of the State court as to the effect of one State statute upon an earlier one, or to declare which of two rules, supported by conflicting decisions, the State will apply.

That there was no conflict between this decision and the previous adjudications, is clearly pointed out in *Stevens* v. *McClaughry, 207 Fed. Rep. 18.*

It is to be observed in the present case, that the point on which we rely, the loss of jurisdiction, occurred at the later stages of the trial which culminated in the verdict whose nullity we assert, at a time when the appellant and his counsel were absent from the court, as the result of coercion. He never knew of the circumstances under which the verdict was rendered in his absence, until after he had been sentenced to death and judgment had been pronounced against him. At that time jurisdiction no longer existed. There was nothing that he could have done then, for the protection of his rights of which he had already been deprived. Had he then undertaken to call the attention of the court to the fact that his constitutional rights had been impaired, the situation could not have been altered. The verdict had been received and the jury discharged. He had been condemned without due process of law, and nothing that the court could do, would restore the jurisdiction which it had lost, or impart life to that which was dead. It is likewise true that

there was nothing that he or his counsel could have done to overcome the action of the mob which was subverting the orderly processes of the law. The Court itself confessed its powerlessness, and submitted to mob domination. That invalidated the trial and nothing could thereafter make it valid.

Even assuming that appellant's motion for a new trial might have been predicated upon this deprivation of his rights and the loss of jurisdiction which ensued (although the Supreme Court of Georgia in *Nolan v. State, 53 Ga. 137; 55 Ga. 522*, and in other decisions, had adjudged it not to be the proper remedy,) yet the fact that the point was not raised by that motion or by writ of error to review the denial of the motion for a new trial did not, and could not, confer validity on that which was a nullity.

The appellant, however, attempted to raise the jurisdictional question by a motion to set aside the verdict, and to review it in this Court by writ of error. That opportunity was not vouchsafed to him, because the decision of the Supreme Court of Georgia, was based in part on a non-Federal question. Yet appellant's inability to procure a review here of the decision of the State court did not convert into due process of law that which offended against the constitutional requirements, and therefore should not preclude him from raising the question which he now seeks to present by habeas corpus, namely, whether or not the judgment pronounced against him was void because at the time of its pronouncement the court had lost jurisdiction.

In *Stevens* v. *McClaughry, 207 Fed. Rep. 18,* where the prisoner failed to seek relief by writ of error until it was too late, it was nevertheless held that it was within the power of the court to grant him relief from detention under a void judgment.

So, in the present case, if the prisoner had failed altogether to make a motion for a new trial or to apply for a writ of error until it was too late, the same result would follow. An utter failure to apply for a writ of error until it is too late, does not differ from a failure to raise the question of jurisdiction in the State court in a proceeding in which that objection might have been raised, but was not in fact raised.

Indeed the exhaustion of remedies in the State courts cannot be said to be a jurisdictional condition precedent to the institution of habeas corpus proceedings in the Federal Court. This Court has merely indicated that, in certain cases such procedure is proper and desirable. But the right has always been reserved by it, in cases of importance, to act regardless of the proceedings taken to review the determination of the State courts.

In the present case there was a most strenuous and earnest effort to obtain such review. Counsel acted on the assumption that the rule laid down in *Nolan* v. *State, supra,* was the law of Georgia. It was not until the decision in appellant's case by the Supreme Court of that State, that it had ever been held in that court that the proper remedy in such a case as the present, was not that pointed out in *Nolan* v. *State*—a motion to set aside the verdict—but a motion for a new trial.

The circumstances in the present case are such, that we feel justified in enlarging on the phase of the subject which we are now discussing, not for the purpose of seeking to review the decision of the Supreme Court of Georgia in *Frank* v. *State, 83 S. E. Rep. 645,* as to what the proper procedure in that State is, but to show that the appellant and his counsel had at least ample justification, in the decisions of Georgia, for their omission to raise the fundamental questions which are presented by this proceeding, on the motion for a new trial, and for their conclusion that the proper mode of presenting them was by the motion subsequently made to set aside the verdict.

In *Nolan* v. *State, 53 Ga. 136,* the prisoner, after his first conviction, moved in arrest of judgment, stating as a ground for reversal, that the verdict of the jury had been received in his absence. The Supreme Court decided that such a motion was not the proper remedy, but that a motion to set aside the verdict was. The judgment of conviction was affirmed. After the affirmance, the prisoner moved to set aside the verdict on the ground of its illegality. That motion was granted. A second trial followed, and the judgment then rendered was brought for review to the Supreme Court of Georgia, in *Nolan* v. *State, 55 Ga. 521.* There the propriety of the procedure adopted was recognized.

These decisions, rendered in 1874 and 1875, respectively, were considered by the legal profession in Georgia as firmly establishing the proposition, that a motion to set aside the verdict was in such a case the correct practice.

In November, 1909, the Court of Appeals of Georgia, which has jurisdiction to declare and promulgate the law (*Georgia Laws 1906, p. 24; Georgia Code of 1910, § 6506*), in an opinion by Chief Justice Hill, couched in terms incapable of being misunderstood, in *Lyons* v. *State, 7 Ga. App. 50*, declared the law as follows:

"This is not a motion to set aside a judgment; because there seems to have been no judgment rendered in the case. It is a petition to vacate and set aside a verdict, for an irregularity not appearing on the face of the record, on which a rule was issued and served; and it certainly constituted a proceeding in a court of law having full jurisdiction of the subject-matter alleged in the petition. We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. The rendition of the verdict during his enforced absence, without a waiver by himself, deprived him of a constitutional right. The error is hardly one that would be proper matter in a motion for a new trial; and if the defendant were compelled to resort to a motion for a new trial to correct such error, he would be prevented from asserting another great constitutional right,—the right not to be again placed in jeopardy for the same offense. Neither his counsel nor himself was present to object to the reception of the verdict. Certainly it could not be expected that he would be required to file a bill in equity, if such a thing could be done, to get rid of this verdict which had been improperly rendered in his absence. The procedure which he adopted was a direct and simple procedure for the assertion of his rights and for the application of the remedy for which he prayed. It was a remedy approved by Chief Justice Warner, speaking for the court, in the case of *Nolan* v. *State, 53 Ga. 138*, as follows: 'It was the legal right of the defendant to be present when the verdict was rendered; and had a motion to

set aside such verdict been made on the ground of his absence, it should have been granted.' 'If the defendant is not present when the verdict is rendered, that is a fact extrinsic of the record, and may be shown on a motion to set aside the verdict for that reason.' 'A verdict rendered during the compulsory absence of the defendant is illegal, and will be set aside on motion.' *Barton v. State, 67 Ga. 653 (44 Am. R. 743).* The procedure adopted in this case is in accord with the trend of modern judicial utterance and legislative enactment to do away with all technical niceties of pleading and to present to the court, clearly and simply, the issues involved in the case."

These decisions, and others that followed them, had never been departed from until the announcement of that, printed at pages 22-39 of the present record. The new Georgia procedure was thus for the first time promulgated in the appellant's case, and in a form which conflicted *in toto,* with the prior promulgation by the State Supreme Court of the practice which appellant followed.

The dilemma of appellant's counsel can be best illustrated by what the Supreme Court said on the two occasions when the *Nolan* case came before it, and what it subsequently said in his case:

From the first Nolan case:

"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his

From the Frank case:

"This last statement (that a motion to set aside the verdict was the proper remedy), from an examination of the record, is obiter. But what was probably meant by a motion to set aside was in the sense of being a motion

absence, that motion should have been granted by the court."

From the second Nolan case:

"The motion to set aside the verdict in the case at bar was made after the denial of a motion in arrest of judgment: see 53 Georgia Reports, 137; and the state contends that such a motion (motion to set aside) is equivalent to an application for a new trial: 30 Georgia Reports, 191. This is an effort to draw the prisoner into a second jeopardy as the price of escaping from the first. It is hard enough to pay the price where a new trial is actually moved for and granted. We think such a traffic in jeopardies is not to be considered as conducted by implication. The bill of rights declares that 'no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in a case of mistrial. Code, section 5000."

for a new trial, as such motions have been likened to motions in arrest and to set aside."

"See *Prescott* v. *Bennett, 50 Ga. 266, 272,* where Judge Trippe said:

'It is true that a motion entitled a motion to set aside is sometimes made for matters extrinsic the pleadings or record. In such cases they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect.'

This is probably what Judge Warner meant by the obiter expression quoted above from the Nolan case; for, from the cases cited in which opinions were delivered prior to that utterance. it will be seen that a motion for a new trial was an available remedy in such cases, and it will be noted, too, that Judge Warner presided and delivered the opinion of the court in the Prescott Case, in which Judge Trippe used the language quoted above in his concurring opinion."

It is further to be noted that, while in our case the Supreme Court of Georgia held, that the failure to raise the question, which we are treating as jurisdictional, on a motion for a new trial, operated as an acquiescence in and a waiver of the objection, in *Nolan* v. *State* no motion for a new trial was made, and the motion to set aside the verdict was filed and entertained at a term subsequent to that at which the prisoner had been convicted.

The Code of Georgia in force at the time of the *Nolan* decision (*Georgia Code of 1873, § 3719*) provided:

"3719: *Application to be made during term.* All applications for a new trial, except in extraordinary cases, *must be made during the term at which the trial was had,* but may be heard, determined and returned in vacation."

The Code of Georgia in force at the time of appellant's trial (*Georgia Code of 1910, § 6089*) reads:

"6089. *Application for new trial.* All applications for a new trial, except in extraordinary cases, *must be made during the term at which the trial was had;* and when the term continues longer than thirty days the application shall be filed within thirty days from the trial, together with the brief of evidence, subject to the approval of the judge and subject to the right of amendment allowed in applications for a new trial; and all applications herein provided for may be heard, determined and returned in vacation."

It necessarily follows, that if failure to include the objections on which we now rely in a motion

for a new trial actually filed, rendered them unavailable, then certainly the same consequences should have followed in a case where no motion for a new trial was filed at all.

In the recent decision of the Supreme Court of Georgia in appellant's case, reliance was placed on the decision in *Lampkin* v. *State, 87 Ga. 517* (*Rec. p. 37*). The interpretation given to that latter, was we submit one, which could not have been foreseen by appellant or his counsel. That is indicated by comparing the language of the prior decision with the interpretation given to it in the later opinion:

Seventh headnote in Lampkin case:

"When facts, and a witness by whom they can be proved, to manifest the incompentency of a juror, come to the knowledge of counsel for the accused, after the jury are sworn but before any further step in the trial has been taken, the question of the juror's competency should then be raised and submitted to the court. It is not sound practice for counsel to remain silent, take the chances of acquittal for his client and then, after conviction, urge the juror's incompetency as a ground for setting the verdict aside."

From the Frank case:

"As said by this court in effect in the case of Lampkin *v.* State, 87 Ga. 517, 13 S. E. 523, it is not sound practice for counsel to make a waiver of their client's presence at the reception of the verdict, take the chances of acquittal for their client, and then, after verdict of guilty, the defendant should be allowed to repudiate the action of counsel to set aside the verdict because of the absence of the defendant at the time it was rendered."

The effect of this unexpected announcement of a new rule of procedure was, to deprive this Court of the right to review the decision of the Supreme Court of Georgia by writ of error, a procedural question being presented which was non-Federal, and, therefore, non-reviewable although the State Court also undertook to decide a question arising under the Federal Constitution.

It would prove a serious reflection upon the law, which would give rise to unfortunate misunderstanding and serious animadversion, if, under these circumstances, a man may be deprived of his life by a judgment void for lack of jurisdiction, simply because counsel resorted to what the court *ex post facto* declared to be the wrong remedy, although in reality they sought to pursue the strict letter of previous adjudications.

IX.

Judge Newman entirely misconceived the decisions which led to a denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them.

The reason for the denial of a writ of error by this Court, and its several members, was not that a Federal question was not involved in the case, but that the Supreme Court of Georgia put its decision upon two grounds, (1) that the Fourteenth Amendment to the Constitution was not

violated, and (2) that in any event it was too late to raise that question on the motion to set aside the verdict, because it should have been raised on the motion for a new trial, which appellant had made.

If the second of these grounds had been omitted, then, unquestionably, a Federal question would have been involved, namely, whether or not the petitioner had been deprived of due process of law. But inasmuch as the court rested its decision on two grounds, one of them constitutional and the other procedural, and each of the grounds was a sufficient basis for the affirmance by the Supreme Court of Georgia of the judgment of the lower court, this Court held, in accordance with numerous precedents, that under these circumstances a writ of error from this Court would not lie.

Waters-Pierce Oil Co. v. *Texas, 212 U. S. 112.*
Allen v. *Arguimbau, 198 U. S. 149.*
Garr, Scott & Co. v. *Shannon, 223 U. S. 458.*

Our hope was, to satisfy the Court that the two grounds stated were not independent of one another, but interdependent, and that the decision of the Supreme Court of Georgia amounted, in substance, to a determination, that the failure to raise the objection based on the absence of the petitioner at the time of the rendition of the verdict, was in effect a determination that, by his non-action or acquiescence, he had waived a constitutional right which, it had been held by this Court, could not be waived expressly. It is evident, however, that the view prevailed here, that

the Supreme Court of Georgia, whether right or wrong, had determined that the proper remedy was a motion for a new trial, and not a motion to set aside the verdict.

Our present proceeding, an application for a writ of *habeas corpus*, is not circumscribed by any procedural objection of the character involved on the application for a writ of error. It is an independent and plenary proceeding in the Federal court, based on the proposition that, because the appellant was prevented from being present in court, at the time of the rendition of the verdict without his fault and because he was deprived of a trial before a competent tribunal, the judgment based on the verdict was a nullity, he having been deprived of due process of law, and in consequence the court had lost jurisdiction. That presents a proposition which is not affected by State practice. The case is in the precise situation that it would occupy if no timely proceeding had been attempted in the State courts of Georgia, either by motion for a new trial or to set aside the verdict. In that event, the bare question presented in this proceeding would have been, Did the court possess jurisdiction to pronounce sentence of death? That is the exact condition that now exists. That is the same question which must now be answered. The fact that unavailing attempts have been made to procure a determination of this question in the State court, does not preclude the appellant from now asserting the nullity of the judgment. If the trial court lost jurisdiction by the facts detailed in the petition, if the judgment of death was thereby rendered a nullity, the appellant's unavailing attempts in the State court for relief from the consequences of such action,

cannot make that a legal judgment which was before a nullity.

It is to meet just such situations, that the sacred writ of *habeas corpus* was devised, and it would be a sad day in our judicial history if a man, struggling for life as against a void judgment, should be informed that, because of an error in procedure, that which is in realty nothing, has become an effective instrument of death.

X.

In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment.

There is abundance of authority in support of this proposition.

In *Ex parte Badgley, 7 Cowen 472,* it was adjudged that where there are two causes of imprisonment or detention, one good, and the other invalid, the Court may on *habeas corpus,* dis-

charge as to the invalid cause, and remand the prisoner as to the other.

In *Medley, Petitioner, 134 U. S. 160, 174,* one convicted in the State Court of murder, was sentenced to death, that being the punishment when the crime was committed and to the further punishment of imprisonment by solitary confinement until execution. This Court held that the sentence imposing both punishments was void, the law authorizing it being *ex post facto.* Dealing with the question as to what subsequent proceedings were proper, Mr. Justice Miller said:

"The language of the act of Congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court, or justice, or judge (before whom the prisoner may be brought by writ of *habeas corpus*) shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

"What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of Section 753, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against, in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is an *ex post facto* law in regard to his offense, it repeals

the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the Attorney General of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court."

In *re Bonner, 151 U. S. 256-259, 261, 262,* the petitioner was sentenced on conviction to imprisonment in a penitentiary, which it was decided was an illegal punishment. Discussing the judgment which under the circumstances should be rendered in the *habeas corpus* proceedings instituted in this Court, Mr. Justice Field said:

A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges—perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that, therefore, the writ of *habeas corpus* cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited. But that question is only of speculative interest here, for there is here no question of excess of punish-

ment. The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of *habeas corpus* in such a case is a virtual suspension of it, and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source—equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals. * * *

"The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*. Section 761 of the Revised Statutes on this subject provides that: 'The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' It would seem that in the interest of justice and to prevent its defeat, this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects for want of jurisdiction which are the subject of complaint in that judgment may be corrected. *Medley, Petitioner, 134 U. S. 160, 174.*

"In the case of *Coleman* v. *Tennessee, 97 U. S. 509,* a party, who had been convicted of a capital offense, and the judgment had been confirmed by the Supreme Court of that State, was discharged by judgment of this court because it was held that the State court had no jurisdiction to try a soldier of the army of the United States for a military offense committed by him whilst in the military service and subject to the articles of war. But as it appeared that the prisoner had been tried by a court-martial regularly convened in the army for the same offense and sentenced to be shot, and had afterwards escaped, this court, in reversing the judgment of the Supreme Court of Tennessee, stated that that court could turn the

prisoner over to the military authorities of the United States. He was so turned over, and the punishment was commuted to life imprisonment, and he was sent to Fort Leavenworth to serve it out.

. "In some cases, it is true that no correction can be made of the judgment, as where the court had under the law no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging on *habeas corpus* persons who have been duly convicted will be thus removed."

In *Ex parte Scott, 70 Miss. 247, 11 So. Rep. 657,* the general nature of which bears strong resemblance to the present case, Judge Woods said:

"The petition of the relator avers that he is in the custody of the sheriff of Warren County, who holds him as the agent of the keeper of the State prison, and to whom the said sheriff is about to deliver him, to undergo imprisonment pursuant to the judgment of the circuit court of said county, and that such judgment is a nullity, because relator says it was founded upon a verdict rendered against him by eleven men. The return of the sheriff, among other matters showing his authority for relator's detention, states that the judgment of said circuit court (meaning the record of said court) shows that the relator was tried by eleven jurors; * * * Mere reversible error must not be examined into on *habeas corpus,* and the party must be driven to his direct appeal, the proper mode of rectification of irregularities. But for incurable, radical, fatal defects, plainly and indisputably manifest of record, relief should be granted even on *habeas corpus.* The error complained of is incurable by any supplementary oral proof. It is not an irregularity merely. It is an omission

of a fact from the record which no presumption may be invoked to supply. It is a fatal defect, affecting the jurisdiction of the court. The constitutional right to trial by twelve men must be secured to every defendant, and a verdict by six men, or by eleven men, is absolutely void, and judgment founded on such nullity must necessarily be itself a nullity. The court undoubtedly had jurisdiction of the relator and of the subject-matter, and ordinarily no other question will be considered on *habeas corpus. But, in the present instance, we see indisputably the intervention of an unauthorized agency, whereby the defendant's guilt of the crime laid to his charge was established and the jurisdiction of the court was broken and lost. There was no power to pronounce judgment, because there was no verdict of guilt on which to base it. In our view, the relator stands just as if he had not been tried at all.* The verdict is a nullity, and the judgment upon it is a nullity. The judgment below will be reversed, but the prisoner will not be discharged. He has not yet been tried, and will therefore be remanded to the custody of the sheriff of Warren County, to be held to answer the charge of burglary and larceny originally preferred against him."

In *People ex rel. Devoe* v. *Kelly, 97 N. Y. 212,* it was held, that where a person convicted of the crime of assault in the third degree was sentenced to imprisonment at hard labor in State's prison, while the sentence was void, the conviction was valid; the prisoner was therefore not entitled to a discharge on *habeas corpus,* but should be remanded to the custody of the sheriff, that the trial court might deal with him according to law. Judge Danforth, said:

"But the conviction is still valid and the prisoner not entitled to his discharge. He should be

remanded to the sheriff of Otsego county in order that the Court of Sessions may deal with him according to law. (*People ex rel Bork* v. *Gilbert, 96 N. Y. 631; People v. Bork, id. 188.*) So far, therefore, as the order of the county judge directs the prisoner to be remanded to the custody of the sheriff, it is right, as is also the judgment of the General Term, so far as it affirms such direction, and to that extent they should be affirmed."

In *Michaelson* v. *Beemer, 72 Neb. 761, 101 N. W. Rep. 1007,* it was held, that where a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime, before a court of competent jurisdiction, on a *habeas corpus* proceeding he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him. Commissioner Oldham said:

"But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the Constitution and laws of this State that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence based on such judgment was a mere nullity, and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the district court as remanded

the prisoner to the custody of the warden of the penitentiary is erroneous, and should be set aside.

"It does not follow, however, as contended by counsel for the prisoner, that because the commitment under which the warden detains the prisone is insufficient, that the prisoner should be discharged from further proceedings, for it is provided by *Section 2492, Cobbey's Ann St.*, which governs *habeas corpus* proceedings, among other things, that when the said judge shall have examined into the cause of the caption and detention of the prisoner so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such person from said confinement, and, in case the person or persons applying for such writ shall be confined or detained in a legal manner on a charge of having committed any crime or offense, the said judge shall at his discretion, commit, discharge, or let to bail such person or persons. Now, it clearly appears that an information properly charging the offense of grand larceny, to which the prisoner has pleaded not guilty, is pending against him for trial before a duly authorized tribunal in Garfield County, and the rule covering such case is that, if the commitment on which the prisoner is detained is insufficient, the court, on *habeas corpus*, will discharge the prisoner from that commitment, and will recommit him to the custody of the court having jurisdiction of the offense properly charged by indictment or information against him. *Ex parte Bennett, Fed. Cas. No. 1311, 2 Cranch, C. C. 612; In re Ring, 28 Cal. 248; Miller v. Snyder, 6 Ind. 1; In re Mason, 8 Mich. 70; Ex parte Badgely, 7 Cow. 472.*

"It is therefore recommended that the judgment of the district court be reversed, and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the

judge of the district court of Garfield County, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court of Garfield County to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district Court of Garfield County, as provided by *Section 2492, Cobbey's Ann. St.*, and that in default of the recognizance so directed the prisoner be committed to the jail of Garfield County, there to remain until discharged by due process of law."

XI.

It is respectfully submitted that the judgment of the District Court of the United States for the Northern District of Georgia, should be reversed, and a writ of habeas corpus allowed, as prayed.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Appellant's Counsel.

APPENDIX.

(Referred to on pages 71 and 73.)

GEORGIA.

In Georgia, the presence of the accused at all stages has been held to be essential to the validity of the trial. The following stages of the trial have been specifically dealt with:

1. **At his arraignment:**
   Wells v. *Terrell, 121 Ga. 368.*

2. **At the declaration of a mistrial.**
   Bagwell v. *State, 129 Ga. 170.*

3. **At the argument of the Solicitor-general:**
   Tiller v. *State, 96 Ga. 430.*

4. **At the reading over by the court of the written testimony taken down by it to the jury:**
   Wade v. *State, 12 Ga. 25.*

5. **At the charge of the court:**
   Hopson v. *State, 116 Ga. 90.*

6. **At a recharge:**
   Martin v. *State, 51 Ga. 567.*
   Bonner v. *State, 67 Ga. 510.*
   Wilson v. *State, 87 Ga. 583.*

7. **At the rendition of the verdict:**
   Nolan v. *State, 53 Ga. 137.*
   Barton v. *State, 67 Ga. 653.*

Excerpts from the above decisions are given below in the order cited.

In *Wells* v. *Terrell, Governor, 121 Ga., 368,* the Court, speaking unanimously through Mr. Justice Lamar, said: in the 3rd headnote:

"It is universally held that a defendant in a felony case cannot be arraigned or plead in his absence."

In *Bagwell* v. *State, 129 Ga. 170,* the first headnote of a unanimous decision was:

"In a prosecution for a felony the accused has the right to be present at every stage of the trial; and where the court in such a case, without the consent of the accused and during his enforced absence—he being confined in jail—ordered a mistrial because of the inability of the jury to agree, on a subsequent trial of the same case it was error, requiring a reversal, to strike a plea setting up such unauthorized mistrial and the former jeopardy of the accused."

In *Tiller* v. *State, 96 Ga. 430,* a trial of an indictment for murder, the solicitor general was permitted through the inadvertence of the court to make his argument to the jury during the absence of the accused. Speaking for a unanimous court, Mr. Justice Samuel Lumpkin said:

"The rule that one on trial for a criminal offense is entitled to be personally present at every stage of the proceedings, is too well settled to require argument or the citation of authority. This rule, both in England and in this country, is so well recognized by the standard text-writers and by judicial decisions in an almost unbroken line of cases, that its existence cannot now be seriously called into question. It cannot be doubted

that the argument of counsel is a stage of the proceedings, for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses. When the accused is on bail, and therefore in control of his own movements, he may, by voluntarily absenting himself from the court-room, be deemed to have waived his right to make any objection to the validity of the trial because of his absence. In the case of *Commonwealth* v. *McCarthy*, recently decided by the Supreme Court of Massachusetts, 40 N. E. Rep. 766, it was held that when a person on trial for felony, who was on bail, voluntarily absented himself without leave when the jury retired to consider the case, and remained absent, the verdict rendered in his absence was binding upon him. But Knowlton, J., who delivered the opinion of the court, distinctly stated the general rule we have above announced, and in support thereof cited numerous authorities, which, as already intimated, might be multiplied indefinitely. *The case is altogether different when the accused has not been admitted to bail, but is confined in jail, and therefore in the strictest sense a prisoner whose movements are absolutely controlled by the court.* In the case with which we are now dealing, the accused was such a prisoner. Assuming his right to be present while the solicitor-general was arguing the case to the jury, and the accused being then absent, though the presiding judge was not actually aware of the fact, the real question is: Did the failure of counsel for the accused to call the attention of the court to the fact that the accused was not present constitute a binding waiver by or for him of his undoubted right to be present?"

"It does not appear from the record that the counsel knew of the prisoner's absence; but

granting that he had such knowledge, or is chargeable with it, could his mere silence be held sufficient to constitute such a waiver? We think not. In the case of *Bonner* v. *State, 67 Ga. 510,* this court held that in view of the right of the prisoner in a criminal case to be present in person throughout the trial, it was error for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel were present and kept silent. This case is, in principle, directly applicable to the case at bar, because the argument to the jury was a matter of great importance, and of almost, if not altogether, as much concern to the accused as the charge of the court. We therefore are of the opinion that it was a duty devolving upon the judge himself to see to it that the accused was brought from jail to the court-room before allowing the argument to proceed; and the omission to perform this duty is of sufficient gravity to require the granting of a new trial. We do not mean to say that the duty of seeing that his client was present did not also rest upon the counsel; but his failure in this respect should not relieve the judge of giving the proper attention to this matter, *he being primarily, and above all others, responsible for the regularity and lawfulness of the trial.*"

In the case of *Wade* v. *State, 12 Ga. 25,* Judge Warner said:

"Another ground taken for a new trial, is that the Court erred in calling the Jury from their room after they had retired to consider their verdict, into the Court room, and reading over to them the written testimony as taken down by the Court, without the *consent* of the prisoner's counsel, and while *the prisoner was absent.*'

"This was clearly error. The Court has no more authority under the law, to read over the testimony to the Jury, affecting the life or lib-

erty of the defendant in *his absence,* than it has to examine the witnesses in relation thereto, in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be *present,* and see and hear, *all the proceedings* which are had against him on the trial before the Court. It is said the presumption must be, that the Court read over the testimony correctly, and read over all that was delivered against the defendant; therefore, he was not injured. The answer is, that it was the *legal right* and *privilege of the defendant, to* have been *present in Court* when this proceeding was had before the Jury in relation to the testimony delivered against him; and he is to be considered as standing upon *all his legal rights,* waiving none of them."

In *Hopson* v. *State, 116 Ga. 90,* the Court, speaking through Mr. Justice Samuel Lumpkin, said:

"We are, however, constrained to order a new trial upon another ground of the motion, which complains that, after the court had charged the jury and they had considered the case for some hours, the judge, in the absence of the accused and his counsel, and without any effort to bring them into court, gave to the jury a second charge which was substantially the same as that which had been given before they retired in the first instance. This practice can not be upheld. See *Wade* v. *State, 12 Ga. 25; Martin* v. *State, 51 Ga. 567, Bonner* v. *State, 67 Ga. 510; Wilson* v. *State, 87 Ga. 583; Tiller* v. *State, 96 Ga. 430.* There was no waiver of the right of the accused and his counsel to be present when the second charge was given. It does not appear that both were ignorant of its being given until after the trial had ended; but this makes no difference. It is an inevitable conclusion from the cases cited above that the accused may complain of such an

irregularity after verdict, notwithstanding knowledge thereof by him or his counsel while the trial was in progress. Nor does the fact that the 'recharge' was, in substance, the same as the original charge dispense with the necessity for ordering a new trial. *The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice.*"

In *Martin* v. *State, 51 Ga. 567,* the Court, speaking through Judge Trippe, said:

"It is true the court required the prisoner's counsel to strike from his motion for a new trial the ground that the jury were called back after they had retired, and were again charged by the court in the absence of defendant's counsel. But it still appears from the record that this was the fact, and the reason assigned for striking this ground was that the court understood the solicitor general to say, to-wit: that counsel for defendant had waived everything. Counsel for defendant denied this, and stated what he did waive, which was "the polling of the jury and the reception of the verdict in his absence." There was then a misunderstanding between the counsel for the state and the defendant. Should that mistake or disagreement cause the forfeiture or loss to the defendant of his right to the benefit of counsel during one of the most important portions of his trial, the charge of the court to the jury? The constitutional guaranty that "every person charged with an offense against the law shall have the privilege and benefit of counsel," should be strictly guarded and preserved. So deeply

grafted in our practice has this great right become that none are so low or so poor but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation. Nor does the fact that a defendant is thus represented lessen his right to have his counsel present at all stages of his trial."

In *Bonner* v. *State, 67 Ga. 510,* the court, speaking through Chief Justice Jackson, said:

"Without scanning this entire record, we are of the opinion that a new trial must be granted, on the ground that the court erred in recalling the jury and recharging them at their request, in the absence of the defendant, who was at the time in custody and confinement, though his counsel were present, but silent.

"The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the jury. *12 Ga. 25.* And such was the rule and practice at common law. *Wharton's Crim. Plead. and Prac. 540a, 545, 546, 549, 550.*"

In the case of *Wilson* v. *State, 87 Ga. 583,* Chief Justice Bleckley said:

"The sixth ground of the motion for a new trial complains that the court recharged the jury without notifying defendant and in his absence, although his counsel was present. It appears from the record that the judge did not know whether the accused was present in the court-room or not when the recharge was delivered, and that the fact was that he was in an adjoining room in the custody of an officer, not knowing that the jury

was being recharged, and knowledge did not come to him until after the recharge was concluded. Whether his absence from the room was voluntary or by compulsion, we think the court should not have recharged the jury in his absence. He was in the custody of an officer, and whether the officer took him to the adjoining room with or without his consent, it seems to us, made no difference. There is nothing to indicate that it was his intention to be absent when any material step was to be taken in the trial; and before taking such a material step as recharging the jury, we are of opinion that the court should have seen and known that he was present, verifying the fact, if necessary, by ocular demonstration. The presence of the counsel was no substitute for that of the man on trial. Both should have been present. *Bonner* v. *State 67 Ga. 510; Wade* v. *State, 12 Ga. 25; Martin* v. *State, 51 Ga. 567.*

"There was error in not granting a new trial on this ground of the motion."

In *Barton* v. *State, 57 Ga. 653,* the Court, speaking through Chief Justice Jackson, said:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial—especially at the rendition of the verdict, and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. *Nolan* v. *State, 53 Ga. 137; 55 Ib. 521.*"

"The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order."

In *Nolan* v. *State, 53 Ga. 137,* the Court, speaking through Chief Justice Warner, said:

"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

ALABAMA.

State v. Hughes, 2 Ala. 102.
Eliza v. State, 39 Ala. 693.
Waller v. State, 40 Ala. 332.
Slocovitch v. State, 46 Ala. 227.
Cook v. State, 60 Ala. 39, 41, 31 Am. Rep. 31.
Wells v. State, 147 Ala. 140, 41 S. W. 630.

In *State* v. *Hughes, 2 Ala. 102,* the trial of an indictment for murder, the court said in the 1 and 2 headnotes:

"The 10 sec. of the 1 Art. of the Constitution guarantees to one indicted for a crime, the right to be present in Court, that he may discuss questions of law and fact, which may arise either preparatory to, or pending the trial, and that he may point out objections to the action of the jury, or other proceedings in the cause.

"One tried for a crime, has the right to be present when the jury returns their verdict against him, that he may examine them by the poll, to ascertain if they assent to his conviction."

In *Eliza* (*a freedwoman*) v. *State, 39 Ala. 693,* an indictment for grand larceny, the court said:

"(2) In looking into the record of this case, we find a fatal error, which must reverse the judg-

ment below. In the judgment-entry, it does not sufficiently appear that the prisoner was personally present in court when she was tried and sentenced. The entry recites, that 'this day came S. A. M. Wood, solicitor, and the defendant,' &c.; and it also recites, that she 'be taken *hence* to the jail of Tuskaloosa county,' &c. These recitals are not sufficient to make it affirmatively appear that the prisoner was present *in person*, both during the trial, and at the time of the sentence. The rule is well settled, in England, and in this State, and is *inflexible, that a prisoner, accused of felony, must be arraigned in person, and must plead in person; and in all the subsequent proceedings, it is required that he shall appear in person.*"

In *Waller* (*a freedman*) v. *The State, 40 Ala. 325*, the court said on page 332:

"It was erroneous for the court to allow the jury to return their verdict to the clerk, under the facts of this case. The counsel had no authority to assent thereto, or to waive the right of a prisoner, charged with a felony, *to be present when the jury delivered their verdict to the court. The State* v. *Hughes, 2 Ala. 102; 2 Hawk. ch. 47; 2 Lead. Crim. Cases, 452; Nomague* v. *The People, 1 Breese, 109; 1 Chitty's Crim. Law, 626; 1 Term. R. 434; Prine* v. *Commonwealth, 6 Har. (Pa.) 103; 1 Bish. Cr. Pro. § 688; State* v. *Buckner, 25 Mis. 168; Eliza* v. *The State, 39 Ala. 693.*"

In *Slocovitch* v. *The State, 46 Ala. 227*, the court said in the headnote:

"1. Trial for indictable offense, cannot be had without personal presence of prisoner. No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried *without being personally present in court*, and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal."

In *Cook* v. *The State 60 Ala. 40*, the court said on page 41:

"It was *not within the authority of prisoner's counsel* to waive for him his right to be present when the verdict was delivered.—*Waller* v. *The State, 40 Ala. 333; Young* v. *The State, 39 Ala. 358; Sperry* v. *Commonwealth, supra; Eliza* v. *The State, 39 Ala. 694.*"

In *Wells* v. *The State, 147 Ala. 140*, the court said in 1, 3 and 5 headnotes:

"1. Criminal Law; Verdict; Rendition; Presence of Accused.—It is essential to the validity of a verdict in all criminal cases that it be rendered in open court, and *in the presence of the accused.*"

"3. Same; Reception of Verdict; Recess.—It is error to permit the clerk of the court to receive the verdict of the jury during the recess of the court, in a felony case, in the absence of accused *even with the consent of his counsel.*"

"5. Same; Waiver; Misdemeanors.—The right to be present when the verdict is rendered, in a misdemeanor case, may be waived by the accused."

ARKANSAS.

Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102.
Cole v. State, 10 Ark. 318.
Sweeden v. State, 19 Ark. 205.
Warren v. State, 19 Ark. 214, 68 Am. Dec. 214.
Brown v. State, 24 Ark. 620.
Osborn v. State, 24 Ark. 629.
Gore v. State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832.

In *Sneed* v. *The State, 5 Ark. 431,* an indictment for larceny, the headnotes were as follows:

"Larceny is, by the common law, a felony; and an indictment for a felony cannot be tried unless the prisoner be *personally present* at the trial. The law is thus careful for the safety of the citizen through the whole trial, from his arraignment to the final disposition of the cause, lest in so important a matter he should be prejudiced."

"The prisoner must also be present when the verdict of the jury is returned."

"Where the prisoner is out on bail the rule is the same; the law not regarding the cause of his absence, as whether he be absent voluntarily or against his will."

"A verdict taken in the absence of the prisoner is void."

In *Cole* v. *The State, 10 Ark. 318,* an indictment for assault with intent to murder, the court said on page 325:

"And the authorities are equally numerous, pointed, and respectable, that, in all cases of treason and felony, the verdict, whatever may be its effect *must be delivered in the presence of the defendant in open Court,* and cannot be either privily given, or promulgated, while he is absent, and if he does not appear the jury must be discharged without rendering it. (*1 Ch. Cr. Law 636, 1 Breese 109. Overton's Tenn. Rep. 435. The People* v. *Perkins, 1 Wend. 91.*) And the defendant's being out on bail does not alter the case. *State* v. *Hulbert, 1 Root 91. Sneed* v. *The State, 5 Ark. 432.*"

In *Sweeden* v. *The State, 19 Ark. 205,* an indictment for assault with intent to murder, the court said in the second headnote:

"On indictments for slight misdemeanors, the accused may be tried without being personally present; but *upon charges amounting to felony,* he must be *personally present in Court during the trial.*"

In *Warren* v. *The State, 19 Ark. 214,* the court said in the first headnote:

"In a criminal prosecution for a slight misdemeanor—as for gaming—a verdict may be rendered and a judgment pronounced, without the defendant being personally present in Court at the time."

In *Brown* v. *The State, 24 Ark. 620,* at 627 the court said:

"The remaining ground relied on for a reversal, is well taken. Upon examination, we find that *the record does not show that the accused was personally present in court,* at the time the *venire facias* for the trial of this case was ordered; and it has been repeatedly decided by this court that, *in prosecutions for felony, the defendant must be personally present at each and every time when any step is taken by the court in his cause,* and that the record must affirmatively show the fact."

In *Osborn* v. *The State, 24 Ark. 629,* at page 635, the court said:

"Referring to the transcript, we find that the defendant was not present when the time for the service of a copy of the indictment was waived, nor was he present when the order for a venire was granted on the motion of the attorney for the state; and therefore he was not legally put upon his arraignment, and that it was error in the court to proceed with the trial, until he was so legally arraigned."

In *Gore* v. *The State, 52 Ark. 285,* the court said:

"Criminal Procedure: Trial for felony: Presence of defendant. 'Section 2213 Mansfield's Digest which provides that if a defendant on trial for a felony, escapes from custody after his trial has commenced, 'or if on bail, shall absent himself during the trial, the trial * * * may progress to a verdict,' is not unconstitutional. The guaranty of the Constitution (Art. 2, Sec. 10) that the defendant shall have the right to be confronted with the witnesses against him, does not include the right to abscond and then complain of his own absence."

"It has been uniformly held by this court that a defendant, charged with felony, has a right to be present at every stage of his trial. Sections 8 and 10 of Article 2 of the Constitution have been construed to guarantee him that right. *And it has been often held that a defendant cannot waive his constitutional rights by agreement.* It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him remain, where he, pending a trial, absconds and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty."

CALIFORNIA.

People v. Kohler, 5 Cal. 72.
People v. Ebner, 23 Cal. 159.
People v. Beauchamp, 49 Cal. 41.
People v. Higgins, 59 Cal. 357.

In *The People* v. *Kohler, 5 Cal. 72,* indictment for murder, the court said:

"The bill of exceptions shows that after the jury retired, they returned and asked to hear read two depositions of witnesses of the defendant.

The depositions were read to them, and this was done *during the absence of the prisoner.* The rule is familiar that the prisoner, in a case of felony, must be present during the whole of his trial; and reading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. *In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed.*"

In *People* v *Beauchamp, 49 Cal. 41,* the court said in the 2 headnote:

"Receiving verdict in case of Felony.—In a case of felony, the prisoner must be personally present in Court when the verdict is rendered. *If the verdict is received in his absence, it is not valid.*"

In *People* v. *Higgins, 59 Cal. 357,* the court said:

"The defendant, being charged with a felony, was required to be present during the whole of the trial, including the rendition of the verdict. *Without his presence,* no valid verdict or judgment could be given against him."

COLORADO.

Green v. People, 3 Colo. 68.
Smith v. People, 8 Colo. 457.

In *Green* v. *The People, 3 Colo. 68,* the court said in the headnotes:

"1. Under the statute of Colorado an assault with intent to murder is felony."

"2. It is error to render a verdict in a charge of felony, the defendant being absent and under confinement in jail; *his right to be present cannot be waived by counsel.*"

In *Smith* v. *People, 8 Colo. 457,* the 1st and 2nd headnotes are as follows:

"1. It is a general rule that the prisoner in a case of felony must be present at every step of the proceedings, or the proceedings will be invalid; except in cases of misdemeanor *the privilege cannot be waived by counsel.*"

"2. If the prisoner is deprived of the privilege of being present when the verdict is returned, the verdict must be set aside and a new trial granted, or the judgment will be reversed."

CONNECTICUT.

State v. Hurlbut, 1 Root 90.

In *State* v. *Hurlbut, 1 Root, 90,* (1784), the report of the case was as follows:

"Information for counterfeiting money; trial to the jury, and the defendant was out upon bail: The jury returned into court with their verdict, and the defendant being called did not appear: The question was, whether the court would receive the verdict. *By the Court*: The defendant must appear, or there will be no propriety in receiving the verdict."

FLORIDA.

Holton v. State, 2 Fla. 500.

Gladden v. State, 12 Fla. 562.

Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247.

In *Holton* v. *the State, 2 Fla. 476,* indictment for murder, the court said on page 500:

"But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which

is, that during the trial of a capital case, (the whole trial,) the prisoner has the right to be, and must be, present—no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law, and the tender regard it has for human life; which forbids that any proceedings shall take place in the trial of such a cause, unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it, which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defence."

In *Gladden* v. *The State, 12 Fla. 562,* the court sand in the 14th headnote:

"14. The prisoner, in a capital case, must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions, both of law and of fact, and no step can be taken in his absence."

In *Summeralls* v. *The State, 37 Fla. 162,* the court said on page 164:

"It is well settled by repeated decisions here, as well as in other states, that in cases of felony the accused must be personally present in court during every stage of his trial from its beginning to and including the final passing of sentence. *If it is shown that he was absent during the taking of any essential step in the trial, he can not be said to have had a trial in due course of law.* He has a right to be present in person at the rendition of the verdict in order to exercise the right of polling the jury, and the verdict, in such cases, can not legally be rendered or received during his absence; and it makes no difference whether his absence be voluntary or involuntary."

ILLINOIS.

Holliday v. People, 4 Gilm. (9 Ill.) 111.
Harris v. People, 130 Ill. 457, 22 N. E. 826.

In *Holliday* v. *The People, 4 Gilm. (9 Ill.) 111,* the court said in the last headnote:

"According to the principles of the Common Law, in all capital cases, the verdict must be received in open Court, and in the presence of the prisoner. The rule, however, did not apply to cases of inferior misdemeanor."

In *Harris* v. *The People, 130 Ill. 457,* the court said on page 459:

"It has been a well established rule of the common law from an early period, that a prisoner accused of a felony must be arraigned in person and must plead in person, and his personal appearance is required throughout the trial, and at the time sentence is pronounced. As said *Mr. Chitty*: "Although a defendant accused of a misdemeanor may be found guilty in his absence, this can never be done in capital felonies, but it is necessary that he should personally attend, and it should so appear on the record." 1 Chit. Crim. Law, 414. A leading authority on this question is Rex *v.* Harris, 1 Ld. Raym. 267, Comb. 447, Holt, 399, Skin. 684, in which it was held by Lord Holt, that a judgment can not be given against any man in his absence for a corporal punishment."

KANSAS.

State v. Myrick, 38 Kan. 238.

In *State* v. *Myrick, 38 Kan. 238,* indictment for assault with intent to murder; the court said on page 240:

"His presence is not less necessary or important when the jury are instructed than during the impanelling of the jury, the introduction of evidence, the argument of counsel, or the reception of the verdict. In the present case the defendant was on trial for a felony, and the instructions requested and given were exceedingly important. As the statute forbids the trial of a person for felony, unless such individual be personally present during the trial, the presence of the defendant's counsel and *their consent* to proceeding with the trial in his absence and imprisonment will not cure the illegality. *It has frequently been decided that the right of a defendant in a prosecution for felony to be present is one that cannot be waived by counsel,* and that a reviewing court will not in such cases stop to inquire in regard to the correctness of the instructions given, or steps taken during the absence of the defendant."

KENTUCKY.

Temple v. Commonwealth, (77 Ky.) 14 Bush 769, 29 Am. Rep. 442.

In *Temple* v. *Commonwealth, 14 Bush 769,* (*77 Ky.*) *29 Am. Rep. 442,* which is one of the leading cases on the subject, the court said, in a case of an indictment for murder:

"The bill of rights declares 'That in all criminal prosecutions the accused hath a right to be heard by himself and counsel.' The right exists to be heard by himself and counsel and to have a reasonable opportunity to have his counsel present also at every step in the progress of the trial,

and to deprive him of this right is a violation of that provision of the fundamental law just quoted."

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor. And at no time in the whole course of the trial is this right more valuable than at the final step when the jury are to pronounce that decision which is to restore him to the liberty of a citizen, or to consign him to the scaffold or to a felon's cell in the state prison. He has a right not only to see and know that the whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his."

"The right to poll the jury in criminal causes has in this state always been deemed an essential part of the right of trial by jury. It is guaranteed by both the constitution and the statute, and ought to be maintained and preserved by the courts as essential to the protection of the rights of the citizen."

LOUISIANA.

State v. Ford, 30 La. Ann. 311.

State v. Bradley, 30 La. Ann. 326.

State v. Christian, 30 La. Ann. 367.

State v. Thomas, 128 La. Ann. 813, 55 So. 415.

In *State* v. *Ford, 30 La. 311,* the court said in the 2nd headnote:

"The *presence of the accused,* at the time the verdict against him for a felonious offense is received, *is essential to the validity of the verdict.*"

In State *v.* Christian, 30 La. 367, the court said in the 2nd headnote:

"Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled, and set aside."

In *State* v. *Thomas, 128 La 813,* indictment for murder, the court said in the 1 headnote:

"Not only must the defendant be present at every stage of his trial for a felony, but the record must show his presence or disclose facts that will authorize the presumption that he was present; and a conviction in such case is vitiated when it appears, affirmatively, that the defendant was absent from the court whilst a person, called as juror, was being examined on his *voir dire,* and when he was challenged peremptorily by his (defendant's) counsel." Nor does it affect the question that defendant failed, at the time, to object and except, since "That which the law makes essential, in the deprivation of life and liberty, *cannot be dispensed with or affected by the consent of the accused;* much less, by his mere failure, when on trial and in custody, to object to unauthorized methods."

MASSACHUSETTS.

Commonwealth v. Tobin, 125 Mass. 203.

Commonwealth v. McCarthy, 163 Mass. 458.

In *Commonwealth* v. *Tobin 125 Mass. 203,* indictment for felony, the court said on page 207:

"The law requires the double safeguard against mistake: 1st, the delivery of the verdict by the foreman as the organ of the jury, by word of mouth, in open court, *under the sense of responsibility attending such an utterance in the face of the court and of the public, and, in a case of felony, of the accused;* and 2d, the proclamation by the clerk of that verdict, as understood and recorded by the court. The fact that in this Commonwealth the defendant is not entitled or permitted, as he is in England and in many states, to have the jury polled, makes it peculiarly important for the security of his rights to adhere to the established forms, remembering the words of Chief Justice Shaw, *"In this respect it is true that forms are substance." Commonwealth* v. *Roby, 12 Pick. 496, 514, 515.*

In *Commonwealth v. McCarthy, 163 Mass. 458,* the defendant, after being indicted for larceny, was admitted to bail. He was present during all of the trial until after the jury had retired to consider the case, but he voluntarily went away and remained absent until after the jury had returned a verdict against him, which was received and recorded. While it was held that, under these circumstances, the prisoner not being incarcerated and having voluntarily absconded after the submission of the case to the jury, the verdict would not be interfered with, Mr. Justice Knowlton nevertheless recognized the principle for which we contend in the present case. He said:

"It is a general rule, both in England and in this country, that a trial for a felony cannot be had without the personal presence of the accused.

1 Co. Inst. 227 b. 3 Co. Inst. 110. 1 Chit. Crim. Law, (2d ed.) 635, 636. Rex v. Ladsingham, T. Raym. 193; S. C. 2 Keb. 687, and Ventris, 97. 2 Hale P. C. 298-300. 4 Bl. Com. 375. State v. Hurlbut, 1 Root, 90. People v. Perkins, 1 Wend. 91. Sargent v. State, 11 Ohio, 472. Jones v. State, 26 Ohio St. 208. Prine v. Commonwealth, 18 Penn. St. 103. State v. France, 1 Overton, (Tenn.) 434, 436. Harriman v. State, 2 Greene, (Iowa) 270. Cole v. State, 5 English, (Ark.) 318. State v. Hughes, 2 Ala. 102. State v. Battle, 7 Ala. 259. Kelly v. State, 3 Sm. & Marsh, 518. State v. Cross, 27 Mo. 332. People v. Kohler, 5 Cal. 72. The trial is not concluded until the verdict is received and recorded. *Maurer v. People, 43 N. Y. 1,* and cases above cited. In this Commonwealth we have a statute which embodies the same general rule. *Pub. Sts. c. 214, Par. 10.* See *Commonwealth v. Costello, 121 Mass. 371.* Under this statute, as well as at the common law, it may well be held that when a defendant is in custody under an indictment for a felony the verdict cannot properly be taken in his case without his personal presence, even if he has been in attendance in all previous stages of the trial, and that whether he is in custody or on bail the trial cannot properly be begun in his absence. But whether a defendant who is on bail, and who has been present during his trial until the case has been given to the jury, can nullify the whole proceedings by absenting himself until it becomes necessary to discharge the jury, is a very different question. We have seen no well considered case that decides this question in the affirmative. In most of the reported cases the defendant was in custody, and the failure of the authorities to have him present when the verdict was taken deprived him of a right. In others, when the defendant was on bail there was an attempt to convict him without his being present at all; and in two or three others the general rule was applied without discussion to the case of a defendant on bail who had been

present during a part of the trial and was absent when the verdict was rendered. But it has been repeatedly held, upon careful consideration, that while it is a right of the defendant indicted for a felony to be present when the verdict is rendered as well as during the earlier parts of the trial, and while it is irregular and improper to begin the trial in such a case without the presence of the accused, yet if he is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave and is absent when the verdict is returned, he may be defaulted and a verdict which will be binding upon him may be taken in his absence. *Fight v. State, 7 Ohio 180. Wilson v. State, 2 Ohio St. 319. Price v. State, 36 Miss. 531. Hill v. State, 17 Wis. 675. State v. Wamire, 16 Ind. 357.* See also *Lynch v. Commonwealth, 88 Penn. St. 189.* Such a case is treated as an exception to the general rule, and as a waiver by the defendant of his right to be present.

The principal object of the general rule above referred to is that the defendant may have an opportunity to exercise his right of challenge, and may avail himself of other rights which cannot be so well exercised, if exercised at all, by his counsel in his absence. Another object is that he may be present at the end of the trial to receive the sentence of the court if found guilty; but under a system like ours, where the prisoner is allowed to give bail and to go at large during the hours that the court is not in session until the end of the trial, and afterwards if there are exceptions, or if there is a motion for a new trial, until these matters are disposed of, it would be unreasonable to hold that he can attend until the case is given to the jury, and, when he sees indications that the verdict is to be against him, can make it impossible to complete the trial, and thus nullify all that has been done by absconding".

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MINNESOTA.

State v. Recards, 21 Minn. 47.

In *State* v. *Reckards, 21 Minn. 47,* the court said on page 50:

"Sec. 3, ch. 114, Gen. Stat., provides that even an indictment for misdemeanor may be tried in the absence of the defendant, if he appear by counsel, his personal presence being required only upon his trial for felony."

MISSISSIPPI.

Scaggs v. State, 8 Smed. & M. 722.
Price v. State, 36 Miss. 531, 72 Am. Dec. 195.
Stubbs v. State 49 Miss. 716.
Finch v. State, 53 Miss. 363.
Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. N. S. 509.
Warfield v. State, 96 Miss. 170, 50 So. 561.
Stanley v. State, 97 Miss. 860, 53 So. 497.
Corbin v. State, 99 Miss. 486, 55 So. 43.

In *Scaggs* v. *The State of Mississippi, 8 Smed. & M. 722,* the court said in a headnote:

"In a case of murder, the record must show affirmatively that the accused was present during the trial."

In *Price* v. *The State of Mississippi, 36 Miss. 531* the court said on page 542:

"The general rule is, that the verdict, in cases of felony, must be delivered in open court, and in the presence of the defendant. *1 Chitty Cr. L. 636.* This rule is founded on two reasons: first, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors;

and secondly, in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present, proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court."

In *Stubbs v. The State 49 Miss. 716,* the court said on page 724:

"The rule that the accused, in cases of felony, must be present in person pending the trial, and that this must be affirmatively shown by the record, as we have seen, is not an open question in this State."

In *Finch* v. *State, 53 Miss. 363,* indictment for grand larceny, the court said on page 365:

"The accused had the right to be present when the verdict was announced, that he might witness the proceeding, and poll the jury. It was erroneous to receive the verdict in his absence. The court had no right to discharge the jury under the circumstances."

In *Sherrod* v. *State, 93 Miss. 774,* the 1st, 2nd and 4th headnotes were as follows:

"1. A defendant on trial for a crime other than a capital felony, who is on bond, may waive the right to be present when a verdict is received; but *in capital cases the accused cannot waive the right,* whether he be in jail or on bond, nor in felony cases not capital where he is in jail."

"2. The right to waive the presence of the accused when the verdict is received is personal, and *cannot be exercised by attorney."*

"4. That one indicted for murder and on bond was convicted only of manslaughter does not cure error in receiving the verdict in his voluntary absence."

In *Barfield* v. *State, 96 Miss. 170,* the court said:

"The absence of the defendant, on trial for murder, during a part of the time the jury was being impanelled, is fatal error."

In *Stanley* v. *State, 97 Miss. 860, 53 So. 497,* the first headnote was:

"One on trial for murder has a constitutional right to be present during the entire trial, which he cannot waive; and the inadvertent examination of a witness for him in his absence, while confined in jail, requires the entry of a mistrial, and a trial de novo, notwithstanding his silence on the court being advised of the fact."

In *Corbin* v. *State, 99 Miss. 860, 55 So. 43,* the court said in the 3rd headnote:

"One physically unable to attend his trial for a misdemeanor does not voluntarily absent himself and waive the right to be present, guaranteed by Const. §26; and where he is tried in his absence he is deprived of his constitutional right."

MISSOURI.

State v. Buckner, 25 Mo. 172.

State v. Cross, 27 Mo. 332.

State v. Braunschweig, 36 Mo. 397.

State v. Davis, 66 Mo. 684, 27 Am. Rep. 387.

State v. Smith, 90 Mo. 37, 59, Am. Rep. 4.

In *State* v. *Buckner, 25 Mo. 167,* the court said in the 5th headnote:

"5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally present, not only during the trial, but at the time of the rendition of the verdict."

In *State* v. *Cross, 27 Mo. 332,* the court said in the 1st headnote:

"1. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence."

In *State* v. *Braunschweig, 36 Mo. 397,* the court said in the 1st headnote:

"1. In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence."

In *State* v. *Davis, 66 Mo. 684,* the headnote was as follows:

"A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, quaere?"

In the body of the opinion, the court said on page 686:

"The very term waiver imports a voluntary act, and an act cannot be thus denominated when per-

formed under conditions of practical compulsion. If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects, he thereby jeopards his right to an impartial trial by jury, guaranteed to him by the constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcical, and the merest mockery of justice."

"We do not by the above remarks, intend to be understood as meaning that the accused may not voluntarily, and of his own head, waive any right, short of a constitutional one; but we do mean to assert that such waiver must be one in deed and in truth; in reality, not alone in name and appearance; not made as the result of what is in effect, an intimidatory suggestion of the prosecuting attorney."

In *State* v. *Smith, 90 Mo. 37,* the court said in the 3rd headnote:

"3. Impanelling and examining the jury is a material and substantive step during the trial, within the meaning of the statute, and the defendant cannot waive the requirement to be present when it is taken."

NEBRASKA.

Burley v. State, 1 Neb. 385.

The 3rd and 4th headnotes of the case of *Burley* v. *The State, 1 Neb. 385,* the court said:

"3. The record should also show that the prisoner was present at and during the trial, and at the rendition of the verdict."

"4. *Nor can the prisoner waive his right thus to be present when on trial for a capital felony.*"

NEW JERSEY.

State v. Peacock, 50 N. J. L. 34, 11 Atl. 270.

In *State* v. *Peacock, 50 N. J. L. 34,* it was said in the body of the opinion; the case being an indictment for a felony:

"In felonies, in England, no verdict could be rendered in the absence of the defendant, but in the case of *State* v. *Jackson, 20 Vroom 252,* it was held that by a long course of procedure the practice has become settled in this state to receive the verdict of the jury in all criminal cases, *except capital cases,* without the presence of the accused."

NEW YORK.

People v. Perkins, 1 Wend. 91.

Maurer v. People, 43 N. Y. 1.

One of the leading and earliest cases in this country is *People* v. *Perkins, 1 Wend. 91.* The decision is reported as follows:

"By the Court, Savage, Ch. J. We are of opinion that the verdict was irregular. The prisoner was indicted, and tried, for an offence, formerly called capital. And though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury. We advise that the verdict be set aside, and that there be a new trial."

In *Maurer v. People, 43 N. Y. 1,* the headnotes were as follows:

"All instructions or information given by the court to the jury, having a tendency to influence the verdict, are a part of the trial, within the pro-

vision of the statute that no person indicted for felony can be tried, unless he be personally present during such trial."

"Accordingly, where the plaintiff in error having been indicted, and being on his trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what has been the evidence on particular points, to which the court replied, giving the information requested, *Held,* that this was a proceeding upon the trial within the statute, and the prisoner not having been present, it was error, for which his conviction must be reversed."

"*Held,* further, that neither the *presence of the prisoner's counsel,* nor his ommission to object, *could waive the illegality.*"

NORTH CAROLINA.

State v. Blackwelder, Phil. L. 38.

State v. Bray, 67 N. C. 283.

State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643.

State v. Paylor, 89 N. C. 539.

State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 643.

State v. Cherry, 154 N. C. 624, 70 S. E. 294.

In the course of the opinion, in the case of *State* v. *Blackwelder, 61 N. C. 38,* the court said:

"The question thus presented is one of very great importance in the trial of capital crime. It is whether the prisoner has a right to be present at the bar at all times during the progress of his trial. We believe that the general impression among the profession in this State is, and always has been, that he has such right; and that the practice has always been in conformity to this impression. The point has never been directly adjudicated, but in the case of *State* v. *Craton, 6 Ire. 104,* the implication in favor of the existence

of the right is so strong that we must regard it as equivalent to a positive decision."

The first headnote in *State* v. *Bray, 67 N. C. 283,* was:

"When a verdict, in a case subjecting a party to punishment in the penitentiary, is rendered out of Court, to a Judge at his chambers, in the absence of the prisoner and his counsel, and is entered on the record on the next day, in the absence of the jury and the prisoner; *Held,* that such verdict cannot be sustained."

State v. *Jenkins, 84 N. C. 812,* is one of the leading cases on this subject. The opinion was rendered by Judge Ruffin. The 2nd headnote was as follows:

"In the prosecution of all felonies, the prisoner has the right to be present throughout the trial; and this right cannot be waived in capital felonies; the prisoner must be *actually* present. Whether the prisoner can waive it, in those not capital—quaere; his counsel cannot."

In the opinion in *State* v. *Paylor, 89 N. C. 539,* it was said:

"In the trial of capital felonies, the rule of practice seems to be uniform in all the states that the prisoner should be present during the whole of the trial; *and in favor of life, this rule is never relaxed.*"

State v. *Kelly, 97 N. C. 404,* involved the trial of an indictment for larceny. We call the court's attention to the fact that the obiter statement in the 3rd headnote is contradicted by the opinion. The headnote referred to was as follows:

"*It seems* that a prisoner in a capital felony can waive his right to be present at all stages of the trial, but his counsel cannot waive it for him."

Speaking of capital felonies, the court said in the opinion itself:

"The rule that he must be so present in capital felonies is in favorem vitae."

In *State* v. *Cherry, 154 N. C. 624,* the court said in the 2nd headnote:

In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial; but this right may be voluntarily waived by him, the limitation being made that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do."

OHIO.

Fight vs. State, 7 Ohio 180; s. c. 28 Am. Dec. 626.

Sargent v. State, 11 Ohio 472.

Rose v. State, 20 Ohio 31.

In *Fight v. State, supra,* the prisoner was admitted to bail. After the testimony had been partly heard the court adjourned. The following morning the prisoner did not appear, and a verdict was received in his absence. It was held that, under the circumstances, it was permissible. Mr. Justice Woods differentiated the case from one affecting an incarcerated prisoner. He said:

"A prisoner, in close custody, may be so easily oppressed and deprived of his rights, and it would be so extremely difficult for him to make known

his injuries, and obtain redress, that to prevent unnecessary restraint, and to afford the accused an opportunity of being fully and fairly heard, the rule in reference to him may be reasonable and salutary; * * *. If on bail, I apprehend, neither the courts in Great Britain nor in the United States would proceed to impanel a jury, in a trial for felony, unless the accused were present, to look to his challenges. If the trial, however, is once commenced, and the prisoner in his own wrong leaves the court, abandons his case to the management of counsel, and runs away, I can find no adjudged case to sustain the position, that in England the proceedings would be stayed. Such a case must form an exception to the general rule, and the verdict may be legally received in the absence of the accused. The prisoner cannot be deprived of his right to be present, at all the stages of his trial; but that he must be, under all circumstances, or the proceedings will be erroneous, cannot, we think, be sustained."

In *Sargent* v. *Ohio, 11 Ohio Reports 472,* the 2nd headnote was as follows:

"In criminal cases, the verdict should be received in presence of the prisoner, that he may have the jury polled."

In *Rose* v. *Ohio, 20 Ohio Reports 31,* the court said on page 33;

"Again, an accused person, when a verdict of guilty is returned against him, has a right to have the jury polled. This privilege is never in this State, denied, in a criminal case, although it is a matter of discretion with the court whether it shall or shall not be allowed in a civil case. Of this privilege the accused person is deprived unless present when the verdict is returned. We conceive it to be the right of an accused person to be

present during the trial of his case, and at the return of the verdict, and we think that when deprived of these privileges by being imprisoned in jail, or in any other improper manner, the verdict returned against him should not be followed by judgment or sentence of the court, but a new trial should be ordered if requested."

OKLAHOMA.

Day v. Territory, 2 Okla, 409, 37 Pac. 806.
Leroy v. Territory, 3 Okla, 596, 41 Pac. 612.
Humphrey v. State, 3 Okla, Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972.

In *Day* v. *Territory of Oklahoma, 2 Okla. 409,* the court said on page 412:

"A leading principle that pervades the entire law of criminal precedure is, that after an indictment is found *nothing shall be done in the absence of the prisoner.* While this rule has, at times, in cases of misdemeanor, been somewhat relaxed, yet, in felonies, *it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."* * * *

"From the record, it does not appear affirmatively that the defendant has been afforded his constitutional right of presence during the trial. It may be, and more than likely is true, that the defendant was, in fact, present at all times and that the error is an inadvertence in making up the record when his case was called for consideration; but it would be a dangerous precedent to establish, for the court to assume such to be the truth and thus give its assent to a conviction where the records fail to show that the defendant was actually present on his trial, *thereby saying to the world that the trial of a defendant may take place in this territory, in his absence, in vio-*

lation of a sacred and humane, constitutional, as well as a statutory, immunity."

In *LeRoy* v. *Territory of Oklahoma, 3 Okla. 596,* the court said in the headnote:

"In a criminal prosecution for a felony the defendant must be actually present at every step in the trial, and in cases where it is necessary the record must show affirmatively the fact of his presence. A case-made cannot be so amended by the trial judge as to contradict the records of the court."

In *Humphrey* v. *State, 3 Okla. Crim. Rep. 504,* the court said in the 2nd headnote:

"2. In a criminal prosecution for a felony, the defendant must be present, in person, during the trial, and the record must affirmatively show this fact."

The court said in the opinion on page 507:

"It may appear technical to reverse the case for the failure of the record to show the presence of the defendant, when in all probability the defendant was present at each step taken during the trial. *Courts of last resort must establish precedents under which innocent men are to be tried.* The law presumes every man innocent, and this presumption clings to him until overcome by competent evidence in a fair trial conducted according to law. Even though the evidence in this case is sufficient to warrant the verdict of guilty, yet we must not declare a rule in this case that would deprive an innocent man of any substantial right. It is not the fault of appellate courts when such a precedent must be declared in a case where the proof shows the defendant guilty. The fault, if any there be, is

with the trial court, the clerk, and the prosecuting attorney in their failure to have the record speak the truth."

PENNSYLVANIA.

Dunn v. Com., 6 Pa. St. 384.
Prine v. Com., 18 Pa. St. 103.
Dougherty v. Com., 69 Pa. St. 286.

The 2nd headnote of *Dunn* v. *Commonwealth, 6 Pa. St. 384,* one of the leading cases, was:

"In capital felonies, the record must show that the prisoner was present at the trial, verdict, and passing of the sentence."

The following are extracts from the opinion by Judge Coulter:

"At the rendition of the verdict, the prisoner is entitled to have the jury polled, so that each one shall answer on his own responsibility, *face to face with the prisoner,* as to his guilt or innocence."

"This has been deemed one of the material hedges and safeguards which the common-law forms thro around a person tried for life, and therefore it ought to appear distinctly from the record that he was afforded an opportunity to avail himself of it." * * *

"How easy would it have been for the clerk to enter that "the prisoner being brought into court, and asked, &c., the court proceeded to sentence him to death as follows, &c.;" and how easy is it, in such cases, for the court to see, that, in a matter of life and death, it is so entered."

"We may safely presume, as individuals, in tranquil times, and in an enlightened city, the conduct of the trial was all right; but, as a court,

we can look only to the record, for this record and judgment will be recorded as a precedent for other times; and, if we let in presumptions to supply omissions and defects in records, it will by and by be deemed scarcely necessary to show by the record any of the important safeguards of the trial by jury; and the common-law forms stoutly asserted as a shield of liberty, by the Hampdens, Russels, and Sidneys of other days, will lose their value. *But forms are not merely a shield against the despotism of kings, for there is occasionally a depotism in all countries—a despotism whose terrible voice is heard in tumults and excitements—in the rage of unrestrained and impetuous will, it is then that the stern and inflexible rules of the common-law trial by jury will best prove their importance and value. In the last ten or twenty years there have been mock trials and bloody executions, without the forms of law, in these states a thing which would have been deemed impossible in the primitive days of the republic.*"

"The judgment of this court is, that it does not sufficiently appear by the record that the prisoner was present at the trial, particularly at the rendition of the verdict, nor when sentence of death was passed. Every record of this kind ought to show clearly that the prisoner was tried and sentenced, and is to suffer according to the substantial forms of the law. We cannot say that of this record, and the judgment and sentence is therefore reversed, and the prisoner is discharged."

The case of *Prine v. Commonwealth, 18 Pa. St. 103*, a trial of an indictment for burglary, is a leading case which has probably been more often quoted than any other. The opinion by Chief Justice Gibson is given in full:

"It is undoubtedly error to try a person for felony in his absence, even with his consent. It

would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence. Never has there heretofore been a prisoner tried for a felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. How could the Court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital by our law. In conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in favorem vitae. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when

a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for *the right of a prisoner to be present at his trial is inherent and inalienable.* The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment."

SOUTH CAROLINA.

State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877.

In *State* v. *Atkinson, 40 S. C. 363,* the court said on page 368:

"The right of the accused to be present during every stage of his trial for a capital felony has long been settled, and is still fully recognized."

TENNESSEE.

State v. France, 1 Overt. 434.
Andrews v. State, 2 Sneed 550.
Clark v. State, 4 Humph. 254.
Hutchins v. State, 3 Coldw. 95.
Stewart v. State, 7 Coldw. 338.
Percer v. State, 118 Tenn. 765, 103 S. W. 780.

In *State* v. *France, 1 Tenn. 434,* it is said in the 2nd headnote:

"In criminal cases affecting life or liberty, the accused must be at the bar when the verdict is rendered."

The court said in the opinion:

"Per Curiam. The prisoner must be at the bar otherwise the jury cannot be asked for their ver-

dict, and if he does not appear the jury must be discharged without rendering any; and by Overton, J.: In every case affecting life or limb the accused must not only be present when the evidence is given in, but during the trial and on return of the verdict."

In *Andrews v. State, 2 Sneed (Tenn.) 550,* the court said on page 552:

"In criminal cases of the grade of felony, where the life or liberty of the accused is in peril, he has the right to be present, and must be present during the trial and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over his person to proceed with the trial or to receive the verdict, or to pronounce the final judgment."

"This rule, founded in the justice and wisdom of the common law, is in substance reiterated in our bill of rights; it is necessary to the full and free exercise of the right of the accused to make his defense; and in case he be legally convicted, that effect may be given on his person, to the judgment of the court."

In *Clark v. The State, 4 Humphreys (Tenn.) 254,* the court said in the headnote:

"In cases of felony and treason the verdict must be delivered in open court in the presence of the prisoner, and, therefore, a verdict rendered, on the trial of a defendant for perjury, in his absence, he having been permitted to go at large during the trial and not having appeared, although called, cannot be sustained."

In *Hutchinson v. The State, 3 Caldwell (Tenn.) 95,* the court said in the headnote:

"Appeal. In felonies, the defendant must give bond to appear before the Supreme Court. A court of error has no jurisdiction to try a defendant for a felony, unless he is present in person."

In *Stewart v. The State, 7 Caldwell (Tenn.) 338,* the court said in the 2nd headnote:

"The absence of a prisoner, (who is found guilty of a felony,) when a jury returns their verdict into court, renders the verdict and judgment against him, void."

In *Percer v. State, 118 Tenn. 765,* the court said in the 3rd and 5th headnotes:

"3. The accused is deprived of his fundamental and constitutional right to be present in court during his trial, where, when the verdict of guilty in a murder trial was announced, he was in a room adjoining the courtroom handcuffed to another prisoner, not in sight of the judge and all the jurors, and the view through the doorway was obstructed by the sheriff standing therein and holding the door open."

"5. The right of the accused to be present in the courtroom when the verdict of guilty is announced in a felony case is so fundamental that it cannot be waived by the failure of his counsel to make objection to the rendition of the verdict until the accused can be present."

TEXAS.

Shipp v. State, 11 Tex. App. 46.

Massey v. State, 31 Tex. Cr. Rep. 371, 20 S. W. 758.

Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117.

In *Shipp v. State, 11 Tex. App. 46,* the 2nd headnote was in part as follows:

"The Code of procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on certain occasions, of which one is when the jury return into court for further instructions. *Held,* that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions."

The case of *Massey v. State, 31 Tex. Cr. Rep. 371,* has already been referred to with extensive quotations.

The 3d headnote of the case of *Hill* v. *State, 54 Tex. Crim. Rep. 646,* was as follows:

"3. Upon trial for murder it was reversible error to permit the reproduction of certain testimony on request of the jury, in the absence of the defendant who was on bail; and this, although his counsel waived defendant's presence and said they would not take any advantage of defendant's absence, and although defendant was voluntarily absent; the first section of the act of the Thirtieth Legislature requiring his personal presence at the trial."

In *Derden* v. *State, 56 Tex. Cr. Rep. 396, 402 S. C. 120 S. W. 485,* the Court said:

"Under the uniform holding of this court we are not permitted to inquire as to how far appellant was injured by being deprived of the right to be present. It is sufficient to say that he had a right

to be present, and that he must be present, when the verdict was received, unless his absence is voluntary or wilful. The statute gives the accused the right to witness the proceedings, to hear the verdict, to poll the jury, and he has, as well the right to inspect such verdict and make any legal objection to it. If we should undertake to sustain the proceedings of the court below on the proposition that no harm was done and that appellant's counsel were able to represent and do all for him that he could himself do, if present, this would be equally available in every case, and would have the effect to absolutely nullify the statute."

VIRGINIA.

Sperry v. Commonwealth, 9 Leigh 623, 33 Am. Dec. 261.

Hooker v. Commonwealth, 13 Watt. 763.

Jackson v. Commonwealth, 19 Gratt. 656.

The 1st headnote of *Sperry* v. *Commonwealth, 9 Lee 623,* was:

"Prisoner accused of felony must be arraigned and plead in person; and in all subsequent proceedings he must appear in person and by attorney."

In *Hooker* v. *Commonwealth, 13 Gratt. 763,* the record failed to show the presence of the defendant throughout the trial. The court said in part:

"It is the right of any one when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses' and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected."

In *Jackson* v. *Commonwealth, 19 Gratt. 656,* the Military Court of Appeals, in 1870 said in the 1st headnote:

"1. Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside."

WEST VIRGINIA.

State v. Greer, 22 W. Va. 800.

State v. Stevenson, 64 W. Va. 392, 19 L. R. A. N. S. 713.

State v. Sutter, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. 811, 43 L. R. A. N. S. 399.

In *State* v. *Greer, 22 W. Va. 800,* the court said in the 7th and 8th headnotes:

"7. Proceeding in a trial in the absence of the prisoner in a felony case is fatal to the verdict. It is absolutely necessary, that the prisoner shall be present in court, when anything is done in his case in any way affecting his interest."

"8. Where in a murder trial the state proceeded to cross-examine a witness during the absence of the prisoner, the verdict will be set aside, although the court, when the prisoner was present, instructed the jury to disregard the evidence, and the state proceeded to ask the same questions of the witness and received the same answers."

In *State* v. *Stevenson, 64 W. Va. 392,* there was a plea of guilty of murder in the first degree. In order to advise himself the judge proceeded to question the witnesses. The 2nd headnote was as follows:

"2. It is error to the prejudice of the prisoner's legal rights for the court, after receiving the prisoner's plea of guilty of murder in the first degree, and, before pronouncing judgment thereon, to proceed in the absence of the prisoner to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court or to advise him as to the character of judgment that should be pronounced on said plea."

In *State* v. *Sutter, 71 W. Va. 371,* it was held in the 3d headnote:

"3. Upon a trial for felony after close of the evidence, the judge and the attorneys for both sides go into another room, leaving the accused and the jury in the court room, and in that other room a motion to strike out the evidence of a state witness is made by the accused, and argued, and decided against the accused. On discovery of the absence of the accused, he is sent for, and the judge offers to allow him to again make such motion and argue it, but the accused declines to do so. Such absence of the prisoner demands a new trial."

WISCONSIN.

French v. State, 85 Wisc. 400, 39 Am. St. Rep. 855, 21 L. R. A. 402.

In *French* v. *State, 85 Wisc. 400,* the 3d headnote was:

"3. A conviction of murder cannot be sustained when neither the minutes of the clerk nor the record shows that the prisoner was present in court when the verdict of guilty was rendered,

or that he was present when the sentence was pronounced against him, or immediately before, or that he was asked by the court if he had anything to say why he should not be so sentenced."

COURT OF CLAIMS.

In *Weirman* v. *United States, 36 Court of Claims Rep. 236,* Chief Justice Nott said:

"The petition in this case avers that the defendants were indebted to the claimant for a balance of seaman's wages, and that the money is withheld by reason of the sentence of a naval court-martial. The petition then goes on to state that this court-martial was convened on board the U. S. S. Texas, April 14, 1897, and that the claimant was absent from the court during one day's proceedings. The petition then negatives the condition which would have justified a prisoner's absence from a court-martial by saying that during this day of absence the judge-advocate was present throughout said session, that it was not a secret one, or closed for the purpose of any vote, deliberation, opinion, or sentence. The petition then, probably with intent to put the whole case before the court, concedes that the claimant and his counsel, who was a naval lieutenant, would have been permitted to be present had either applied for leave, and that neither objected to the absence of either, and neither was present; that the assembling of a court-martial on that day was otherwise in conformity to order. The question, therefore, presented is whether the absence of a prisoner or his counsel for one day during the sitting of a court-martial without request to be present or objection to the court's sitting without the presence of the prisoner renders the sentence of the court void.

"The counsel for claimant relies, among other authorities, upon the decision of the Supreme Court of Kentucky in *Allen* v. *The Commonwealth* (86 Ky. R. 643), in which there is a long

array of authorities cited, and in which it is held that 'in cases of felony, the accused has the right to be present, and must be present during the whole of the trial, and until the final judgment;' and upon a case in 55 N. Y. R. 35, where is is held 'that every court is composed of three constitutional parts, the plaintiff, the defendant, and the judicial power to examine the facts, determine the law, and apply the remedy.'

"The claimant also cites the decision of the Supreme Court in *Lewis* v. *United States* (146 U. S. R. 370, 372): 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or by his counsel, to waive the right to be personally present during the trial. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his said plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. (*Prine* v. *The Commonwealth, 18 Penn. St. 103, 104, per Gibson, C. J.*) And it appears to be well settled that where the personal presence is necessary in point of law the record must show the fact.'

"Chief Justice Cooley states the rule with characteristic clearness and precision: 'In cases of felony, where the prisoner's life or liberty is in peril, he has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment.' (Cooley's Const. Limitations, p. 319.)

"It is manifest that a prisoner in custody is not a free agent, who may walk in or out of court as it may please him. His being in court depends

upon proper authority bringing him there. It cannot, therefore, be said that he waives anything by his absence.

"In a civil court the accused may be out on bail, and, ordinarily, must be represented by counsel, who can watch his interests more effectively than he can himself. If it is desirable or necessary that the prisoner in a civil court be present at every proceeding after indictment, it seems to be still more so that a prisoner before a court-martial should be present, for he ordinarily is not represented by counsel learned in the law and watchful of his interests, but (as in this case) by some naval officer acting from a humane motive. Undoubtedly in the past court-martials have been harsh and arbitrary tribunals. The tendency of modern law has been to restrict their powers and curtail their discretion. This is well summed up by the New York Court of Appeals: 'The power of courts-martial was formerly more extensive than now, and was often exercised in the most arbitrary manner. Blackstone denounced this unlimited power by contrasting it with the certainty and precision of the common law, and expressed his sympathy with those who were subject to their jurisdiction in the following forcible paragraph: 'How much, therefore, it is to be regretted that a set of men whose bravery has so often preserved the liberties of their country should be reduced to a state of servitude in the midst of a nation of freemen.' (3 Blackstone, 416.) The power of these courts has been very much restricted and limited since that period, and it is not strange that some of their more rigorous practices should be also modified in a country making still higher pretensions to freedom.' (*People ex rel. Garling* v. *Van Allen, 55 N. Y. R. 31, 35.*)

"With such an array of authorities this court cannot entertain a doubt concerning the general principle above set forth."

COMMON LAW AUTHORITIES AND TEXT WRITERS.

Coke upon Littleton, 227 b.

"But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court."

2 Hale's Pleas of the Crown 300.

"In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given.' Co. Lit. 227 b. Co. P. C. 110."

Dominus Rex. v. Ladsingham, *Sir T. Raym, 193* (1671.)

"An information was exhibited against Mr. Landsingham of Devonshire, lord of a manor there, for oppressing his tenants, and for several misdemeanors; and upon Not Guilty pleaded, he was found guilty; and Stroud moved to set aside the verdict because unduly given. The information being laid in Devonshire, and the trial there, and yet the jury gave a privy verdict in the county of the city of Exeter which was illegal. 1. To give a privy verdict in a criminal cause, contrary to Coke upon Litt. 227, b. 2. To give the verdict out of the county. But to both these the Court answered thus. To the first. 'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, *because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time;* but in criminal cases, where the defendant is not to be personally present at the time of the verdict a privy verdict may be given. And as to the second. Custom hath always been to give the verdict in that place; and the court did not think the first point fit to be

moved, because contrary to the record, but however they resolved as before."

4 Blackstone's Commentaries, 360.

"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms as upon civil causes; *only they cannot, in a criminal case which touches life or member, give a privy verdict. 2 Hal. P. C. 300. 2 Hawk. P. C. 439.*"

1 Chitty Cr. L. 636.

"*Of the verdict.* The verdict whatever may be its effect, must, in all cases of felony and treason be delivered *in the presence of the defendant,* in open court, and cannot be either privily given, or promulgated *while he is absent. Co. Lit. 227, b.;* 3 Inst. 110; *Sir T. Raym. 193; 2 Hale 300; Hawk.* p. 2, c. 47, s. 2; 4 Bla. Com. 360. *Bac. Abr. verdicts, B. Burn, J. Jurors, V. Williams, J. Juries, VII.*"

Bacon's Abridgement, Title "Verdict," page 308.

"It is in one book laid down, that a privy verdict cannot be given in a case of life or member. 1 Inst. 227.

"In two other books it is laid down, that a privy verdict cannot be given in a case of felony; because the jury are directed, and ought, in such case, to look upon the prisoner when they give their verdict."

Raym. 193, Rex v. *Ladsingham; 1 Ventr. 97.*

2 Barbour's Criminal Law 365.

"*Verdict.* The verdict in all cases of felony and treason must be delivered in open court *in the presence of the defendant.*"

Archbold's Crim. Pl. & Ev. 23d Ed., p. 186.

"No trial for felony can be had except *in the presence of the defendant*, and he must, it is said, stand in the dock to be tried."

R. v. *St. George, 9 C. & P. 483.*
R. v. *Douglas, C. & Mar. 193.*
R. v. *Zulueta, 1 C. & K. 215.*

Ibid, p. 214.

"On a trial for treason or felony the jury must deliver their verdict in open court, *in the presence of the defendant.*"

R. v. *Haynes (1900) 64 J. P. 441.*

Abbott's Trial Brief (Criminal Causes) 2d Edition, 718.

"In felony the accused *must be present* when the verdict is rendered, and his counsel cannot waive the right."

Hughes' Criminal Law, §3370.

"*Presence of defendant essential.*—If the prisoner is deprived of the privilege of *being present* when the verdict is returned the verdict must be set aside and a new trial granted, or the judgment will be reversed."

Clark's Criminal Procedure, p. 423.

"In all criminal prosecutions, the defendant has a right *to be present during the entire proceedings,* from arraignment to sentence. *He cannot, according to the weight of authority, waive the privilege in cases of felony,* nor, according to some, but not all, of the authorities, in case of misdemeanor involving corporal punishment."

Wharton's Criminal Pleading and Practice, Eighth Edition, §741.

"*Defendant must be present.* At the time of the rendition of the verdict, as a general rule, the defendant must be present in court, *and in capital cases to take the verdict in his absence is a fatal error.*"

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 778.

LEO M. FRANK, APPELLANT

vs.

C. WHEELER MANGUM,
SHERIFF OF FULTON COUNTY, GEORGIA.
APPELLEE.

Appeal from the District Court of the United States for the Northern District of Georgia.

Brief of
Hugh M. Dorsey,
Attorney General,
Counsel for Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 775.

LEO M. FRANK, *Appellant*, *vs.* C. WHEELER MANGUM, *Sheriff*.	Appeal from the District Court of the United States for the Northern District of Georgia.

ABSTRACT OF CASE.

1. **Status of the case of the State of Georgia vs. Frank (insofar as same can be shown by reference to the record now before this Court) as it was when the Supreme Court of Georgia passed upon appellant's motion to set aside the verdict; and a comparison of this with the allegations in the application for writ of habeas corpus.**

Frank, the appellant, appeals from the decision of the District Court refusing to issue the writ of habeas corpus, and by his petition and the exhibits thereto attached, discloses the following:

That on May 24th, 1913, the grand jury of Fulton County, State of Georgia, indicted him for the murder of Mary Phagan. (Record, page 1, paragraph 3.)

On August 25, 1913, a jury rendered a verdict of guilty. (Record, page 1, paragraph 3.)

On August 26, 1913, said Frank, in conformity with the verdict, was sentenced to death. (Record, page 1, paragraph 3; also page 9.)

On August 26, 1913, Frank filed a motion for a new trial. (Record, page 5, paragraph 7; and page 44.)

This original motion was amended, the 31st of October, 1913, on which date the same was over-ruled. (Record, pages 219 and 220.)

It will be seen by reference to the judgment of the trial judge, namely, Hon. L. S. Roan, which appears at the bottom of page 219 of the Record, that affidavits submitted by the State were considered, and the language of this said order of October 31st, 1913, shows, which is a fact, that said affidavits submitted by the State are not a part of the foregoing motion and amended motion, the grounds of which were approved by the court in an order on said page 219, immediately preceding the order over-ruling the motion.

Thereafter this original motion for a new trial was taken on writ of error to the Supreme Court of Georgia, and by said court on February 17, 1914, judgment was rendered affirming the lower court. (Record, page 5, paragraph 8.)

In said paragraph 8, page 5, Frank in his application for habeas corpus says:

> "The opinion of the Supreme Court of Georgia is reported in Volume 141, Ga., page 243, and the same is hereby referred to."

On page 38 of the transcript of the record in the opinion of the Supreme Court of Georgia dealing with Frank's "Motion to set aside the verdict" rendered, which said motion Frank refers to on page 5, paragraph 9, this said opinion of the Supreme Court of Georgia being attached by Frank as an exhibit to his application for a writ of habeas corpus, the following statement is made, namely:

> "And moreover an extraordinary motion for a new trial was made and has likewise been refused and the judgment overruling it affirmed by this court. Frank vs. State. 142 Ga. —— (83 S. E. —)"

So it appears from the application that two motions, one the ordinary and the other an extraordinary motion for a

new trial, were filed by Frank and decided by the Supreme Court of Georgia before the decision of the Supreme Court on his motion to vacate the verdict was rendered.

On April 16, 1914 (Record, page 5, paragraph 9), Frank filed a motion in the Superior Court of Fulton County, Ga., to set aside the verdict rendered against him, said motion being on grounds set forth in paragraphs 4th, 5th and 6th of the application presented to the District Court. The decision of the Supreme Court on this application is fully set out in the transcript of the Record, beginning on page 22 and ending on page 39. This decision by the Supreme Court of Georgia was rendered Nov. 14, 1914. (Record, page 5, paragraph 11.)

On November 18, 1914, the Supreme Court of Georgia denied Frank a writ of error to the Supreme Court of the United States. (Record, page 7, paragraph 17.)

November 21, 1914, application for a writ of error was made to the justice of the Supreme Court of the United States assigned to the Fifth Circuit, and on November 23, 1914, said application was denied, whereupon a similar application was made to another justice, and on November 25, 1914, denied, and then again to the entire court, which on December 7, 1914, denied the same. (Record, page 7, paragraph 18.)

Briefly the foregoing recounts in chronological order the steps taken in the case against Frank and by Frank, and shows the status of the case at the time the application for a writ of habeas corpus was presented to and denied by his Honor, Judge William T. Newman, judge of the District Court of the Northern District of Georgia.

Appellant's contentions are based on the propositions that his trial in the particulars indicated did not conform to due process of law as guaranteed by the Constitution of the United States, and are set out in his application (page 8) and further disclosed more fully by his assignments of error on the petition for writ of habeas corpus which appears in the Record beginning on page 17, and also by his

assignments of error as filed in this court as shown in the Record beginning on page 226, said contentions being that he is now held in violation of Section One of the Fourteenth Amendment of the Constitution of the United States because of disorder on the part of the public attending the trial, and because, his presence having been expressly waived by his counsel, he was not present at the reception of the verdict. This waiver is disclosed by allegations on page 3, paragraph 5.

BRIEF OF ARGUMENT.

Counsel for appellee desire to present to this court the exact status of the Frank case, insofar as the same can be shown by reference to the Record now before the court, as it was when the Supreme Court of Georgia passed upon appellant's motion to set aside the verdict. (See page 22 of Record.)

In the amended motion for a new trial Frank submitted to that court certain grounds with reference to alleged disorder at his trial and asked the court to grant a new trial upon the same. In other words the following grounds of Frank's amended motion for a new trial dealt with and presented to that court as a basis for a new trial certain alleged acts of disorder on the part of the spectators attending the same, namely:

Ground 24 (Record, page 109).
Ground 38 (Record, page 117).
Ground 64 (Record, page 137).
Ground 65 (Record, page 140).
Ground 66 (Record, page 142).
Ground 75 (Record, page 147).

This application for a habeas corpus is based on almost identically the same allegations. (See paragraph 5, page 2.) The only difference between the questions submitted to the Courts of Georgia and the Federal Courts is that Frank

does not present to the Federal Courts as many grounds or as many instances of alleged disorder as he urged for a new trial in the State Court, but he has endeavored in his application to the Federal Court to enlarge his allegations as to the disorder with reference to the fewer instances which he does see fit now to present in this application.

We have already called the court's attention to the fact that the order of the trial court denying the motion for a new trial (page 219 of the Record) discloses the fact that the State by affidavits took issue with Frank with reference to certain grounds of his motion, and as a further evidence thereof the attention of the court is invited to the decision of the Supreme Court of Georgia, 141 Ga. 246, paragraphs 16 and 17 of the headnotes.

Also the court is invited to consider paragraphs 16 and 17 of the opinion in said case, said paragraphs to be found beginning on page 280. On page 280, in paragraph 16, the court says that "*rebutting proof was submitted by the State.*" It further appears from this opinion, and the paragraph cited, that only two instances referred to by Frank in his motion occurred within the hearing or knowledge of the jury, and this, furthermore, appears also from the grounds of Frank's amended motion as disclosed in the Record before this court. (See ground 38, page 117, and ground 65-c, page 141, and ground 65-b, page 141.)

No motion for a mistrial, it will be seen by reference to this Record, was ever made by counsel for Frank at the time said alleged disorder occurred, and where it occurred in the presence and knowledge of the jury.

Frank's counsel, as this Record now before this court discloses, never made any motion for a mistrial, where the alleged disorder occurred in the presence of the jury until sometime after the occurrence. In other words, when the alleged disorder of which they now complain occurred in the presence of the jury, they permitted it without then and there moving the court to declare a mistrial and without informing the court that the action which the court is

shown to have taken was insufficient, inadequate or unsatisfactory.

In other words, counsel for Frank did not at any time indicate to the court any dissatisfaction with the action that the court took at the time upon whatever complaint is shown to have been presented to the court, except in the two instances to which reference has been made.

The Supreme Court of Georgia, in 141 Ga. 280, paragraph 16, says:

> " . . . and presumably, from what otherwise appears in the Record, the action by the court was deemed satisfactory *at the time* and the orderly progress of the case was resumed without any further action *being requested.* The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment unless a ruling upon said conduct is invoked from the judge *at the time it occurs.*"

We will not cite the authorities relied on by the Supreme Court of Georgia but we will here propound this question to the Court:

Would this court, or would any court, have held differently with reference to such grounds?

Indeed, under the law would any court make a ruling to be followed as a precedent whereby a defendant in a criminal case would be permitted to do as Frank did, namely: make no motion, or express no dissatisfaction with what was done, spend about thirty days in the trial of a case, and then after conviction set aside the verdict?

And does not this court, from Frank's allegations and from the exhibits attached thereto, see that these matters could in no view of the law amount to a failure to give him a trial according to the law of the land?

We do not undertake to quote here all that is said by the Supreme Court of Georgia pertinent to these questions,

because we apprehend that the court will, for itself, read those paragraphs of the decision indicated.

On page 147 of the Record will be found ground 75 of the motion for a new trial. This ground dealt, among other things, with matters alleged to have occurred at the time when the verdict was brought in, and when Frank is shown not to have been present, as indicated by the following excerpt from that ground, to be found on page 148 of the Record, namely:

> "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel."

In connection with the allegations in the habeas corpus application, as found in paragraph 5, pages 2 and 3, paragraph 17 of the Supreme Court of Georgia, in 141 Ga. 281, is to be considered. In the first place this paragraph discloses that a request by Frank or his counsel, although he was absent, was made to poll the jury, and in the second place, it appears that the verdict was read and the polling had begun before the cheering began.

Passing from the allegations with reference to alleged disorder, let us see what the record shows concerning the failure of Frank to be present at the reception of the verdict.

In his application for a writ of habeas corpus, as we have previously shown in reference to another matter, page 3, paragraph 5, the following allegation occurs, namely:

> "He (the judge) requested my counsel to agree that I need not be present at the time that the verdict was rendered and the jury polled."

In ground 75 of his original motion for a new trial, on page 148 of this Record is found the following language, namely:

> "The defendant was not in the courtroom when

the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court," etc.

It will be observed that there is some difference between the two statements. With reference to this incident, as we have already suggested to be the case with reference to the alleged disorder, the allegations of the application are put much stronger in behalf of Frank than was the case when he made the allegations embodied in the motion for a new trial.

The purpose in quoting the language of the 75th ground of the motion for a new trial is, however to show this court that Frank at least had knowledge of the waiver at the time he filed his amended motion for a new trial.

We submit as sound the proposition embodied in the following excerpt from the opinion of the Supreme Court of Georgia on Frank's motion to set aside the verdict, as same appears on page 38 of this Record, namely:

> "The defendant necessarily knew when sentenced by the court, for he was then present, that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law."

It appears from the Record, page 9, that he was sentenced on the 26th of August, 1913, the day after the verdict was rendered.

On page 282 of the decision in the 141 Ga., the Supreme Court of Georgia in discussing the deductions of Frank made from the allegations of fact set out in ground 75, says:

> "We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result."

This quotation shows on the face of this Record that the jurors trying the case completely and absolutely negatived the allegations which are now made in this application by Frank to the effect that they were improperly influenced contrary to the law and the evidence and their oaths.

Frank presented also an extraordinary motion for a new trial and the same was over-ruled and denied. (See page 38 of the Record in this case, and 142 Ga.; also 83 S. E. Reporter, pamphlet No. 2, page 233. This decision refers to the case in the 141 Ga. 243, 80 S. E. 1016). The extraordinary motion was decided by the Supreme Court of Georgia October 14, 1914.

It is not disclosed when this extraordinary motion was filed, but it was presumably filed before or certainly at the time the motion to set aside the verdict was filed. But in any event it had been decided previous to the decision of the Supreme Court, to be found in this record on page 22. On the 26th of August, 1913, when Frank was first sentenced (page 9); on the 7th of March, 1914, when he was sentenced again (page 10), no mention was made of his not having been present at the rendition of the verdict. And the first time that said absence is mentioned was April 16, 1914. (See page 5.)

In other words, for over seven and nearly eight months, during which time he had been twice sentenced, had made two motions for a new trial, he had never presented to the State Courts or to the Federal Courts any proposition claiming a lack of due process of law in that he was not present when the verdict was rendered.

It is respectfully submitted that this state of facts warranted and demanded the conclusions reached by the Supreme Court of Georgia in the opinion on the motion to set aside, beginning on page 22 of this Record. And we respectfully submit that from this Record facts are shown which under no view of the law could be held to have justified any decision other than the one rendered by the Supreme Court of Georgia, and it is respectfully suggested

that on this Record with reference to this question of the absence of Frank at the reception of the verdict this court will hold that he was not denied any right guaranteed to him under the constitution and will not hold that the court lost jurisdiction or that he was not accorded a trial according to the law of the land.

Appellant, in his application, page 2, 5th paragraph, says:

> "It was apparent to the court that public sentiment seemed to be greatly against me."

On page 147, in the 75th ground of his motion for a new trial, he says:

> "Public sentiment seemed to the court to be greatly against me."

In the State of Georgia it is provided by statute, now to be found in Code of 1911, Sec. 964, as follows:

> *"Venue, When and How Changed"*: The defendant in any criminal case in the Superior Court may move by petition in writing for a change in venue, whenever in his judgment an impartial jury cannot be obtained in the county where the crime was committed. Upon the motion it shall not be necessary to examine all persons in the county where the crime is committed liable to serve on the jury, but the judge shall hear evidence by affidavits, or oral testimony, in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it to any county that may be agreed upon by the solicitor-general and the defendant or his counsel, to be tried in the county agreed on. If a county is not thus agreed upon the judge shall select such a county as in his judgment will afford a fair and impartial jury to try the case, and have it transferred accordingly."

Later this statute was amended by the Act of the Georgia Legislature on August 21, 1911, to be found in Georgia Laws of 1911, pages 74 *et seq.*, providing that:

> "It shall be lawful for the judge of the Superior Court of the circuit in which a crime is alleged to have been committed to change the venue of the trial of the said case on his own motion, etc. . . ."

The Record no where discloses that Frank, though he was represented by several counsel, presumably in possession of a knowledge of the temper of the people of the community, ever made any motion to change the venue, and hence it is a fair inference that whatever antagonistic public sentiment, if any, was developed at the time the matters referred to in ground 75 of the motion occurred, was brought about and grew out of the character of the evidence and the case made by the State. Presumably, the judge did his duty, and presumably there was no antagonistic sentiment on the part of the public to Frank at the time he started into his trial, for had there been, presumably, the judge, under the authority of the statute cited, would have, of his own motion, changed the venue; and if not, then, presumably, the public sentiment, if any, claimed by Frank to have been manifest during the trial, was the natural outgrowth and consequence of the evidence adduced on the trial of Frank for the heinous crime of murder. Of course, we cannot go into the evidence adduced on the trial of Frank, because the appellant did not see fit to put it into the Record. But we do not deem it amiss to show from the transcript of the record made by Frank himself what the evidence of the State, when Frank was convicted, tended to show.

The Record now before this court shows evidence tending to prove—and indeed in view of the verdict ordinarily we would be authorized in insisting that it is conclusively proved that:

(a) Mary Phagan the deceased, was "a little girl" (See Record, page 129, ground 47).

"Mary Phagan would have been fourteen years old within a little more than a month, and was physically well developed for a girl of her age." (See 141 Ga., page 249).

(b) She was murdered and the evidence "tended to show that the sexual organ of the girl indicated external violence" . . . "From this testimony it was inferable that the slayer undertook to have some sort of relation or connection with her sexual organ, and possibly in an unnatural way" . . .

"A theory of the State, *which finds a basis in the evidence,* was that the murderer desired to have a sexual relation of some character natural or unnatural, with the deceased" (See 141 Ga. 125 and 156).

(c) "That Frank was the superintendent of the factory in which she worked. That he had previously endeavored to intrude himself upon the deceased" (See Record 129, ground 47).

(d) "That Frank was a man of general bad character for lasciviousness." (See Record, page 135, ground 56, and Record 144, page 70, and 141 Ga. 276.)

(e) "And that Frank was addicted to acts of perversion." (See Record, page 48 and ground 10 and Record, page 51, ground 13.)

The above citations showing the character of the evidence adduced on the trial of Frank have not been cited as we have previously indicated, to show this court his guilt, for this question, as we understand, is not before this court, but the purpose is to disclose that there was in the harrowing details of the crime much which was reasonably calculated to excite the indignation of law abiding citizens. If there were, as alleged, at this trial, which lasted nearly a month, isolated instances of disorder, would it be, the trial

occurring in a populous city (the constitution and laws of the State requiring it to be in public), any more than would naturally and ordinarily be expected. In each instance the court granted all the relief asked by counsel for Frank except to declare a mistrial.

2. Appellant is asking this Court to grant him a writ of habeas corpus which will virtually overturn his conviction in the State Court without submitting to the United States Courts important portions of the record on which the judgment is based, and on which he is being held.

In every motion for new trial a brief of the evidence is required. No motion for a new trial is complete without such copy of the brief of evidence.

> Code of Ga. (1911) Section 6089.
> "It is a part of the record." Code (1911) Sec. 6150.

It matters not that the grounds of the motion could be considered and determined without a reference to the evidence at all, or any part of it—the rule is the same; a brief of evidence cannot be dispensed with, and is a part of the motion.

> Graddy vs. Hightower, 1 Ga. 253.
> Roby vs. State, 74 Ga. 812.
> Baker vs. Johnson, 99 Ga. 324.
> Mize vs. Americus, etc., Co., 106 Ga. 140.
> Holleman vs. Small, 111 Ga. 812.
> Brooks vs. Proctor, 111 Ga. 835.

No brief of the evidence is attached as an exhibit to the application now before the court. The court therefore knows that the statement contained in the 7th paragraph of the application, on page 5 of the record, to the effect that a copy of the motion is exhibited herewith to the court, was not the complete motion.

And since in the order of the judge of the Superior Court overruling the motion for a new trial (see page 219 of the record), there is a recital that the judge considered affidavits submitted by the State; and since in the report of the case of Frank vs. State, 141 Ga. 243, and part on 141 Ga. 280 (this opinion being made a part of the record; paragraph 8 of the application, page 5 of the record) the judge distinctly states that rebuttal proof was submitted to the State on the hearing of the motion, this court knows that the entire record which the courts of Georgia passed on is not presented in Frank's application for habeas corpus.

Will not the Supreme Court of the United States indulge the presumption that attaches to the judgments and decrees of all courts of this character, to-wit.: that there was in these affidavits and in the brief of evidence facts which clearly justified the Superior Court and the Supreme Court of Georgia in its rulings, and when it appears, as it does from this application, that Frank is held under a judgment of the State court not void on its face and his application further discloses that the entire proceedings are not presented in his application for habeas corpus, will this court order a writ to issue based on such parts of the record of his conviction as he chooses to present to the court?

The Supreme Court of Georgia is second to no State in according trials free from hostile demonstrations—and has gone as far, we venture to assert, as any State in the union in setting aside verdicts where the same were influenced by hostile demonstration on the part of spectators.

Lang vs. Hopkins, 10 Ga. 37.
Monroe vs. State, 5 Ga. 139.
Mitcham vs. State, 11 Ga. 616.
Anderson vs. State, 14 Ga. 712.
McGuffie vs. State, 17 Ga. 497.
Martin vs. State, 38 Ga. 296.
Nesbit vs. State, 43 Ga. 238.
Hunter vs. State, 43 Ga. 516.

Westmoreland vs. State, 45 Ga. 279.
Stewart vs. State, 58 Ga. 577.
Hudgins vs. State, 61 Ga. 182.
Moon vs. State, 68 Ga. 696.
Turner vs. State, 70 Ga. 778.
Flanagan vs. State, 106 Ga. 109.
Turner vs. State, 111 Ga. 217.

In Georgia, it has frequently been held, that where a party does not have a fair and impartial trial, in the manner contemplated by law, which is guaranteed to him by the State Constitution, as well as the Constitution of the United States, no matter how strongly the evidence shows his guilt, it must for this reason be set aside and a new trial granted.

Daniel vs. State, 56 Ga. 654.
Smith vs. Lovejoy, 62 Ga. 373.
Woolfolk vs. State, 81 Ga. 551.
Collier vs. State, 115 Ga. 803.

But this is far from holding that whenever an accused *alleges* those things in a motion for new trial, the court should grant a new trial. Under our practice, a movant can *allege* as reasons why he contends a new trial should be granted him, whatever facts he pleases; but the State is permitted by affidavits to make a counter showing, and then the court that passes on his motion becomes as to such disputed facts a trior; and this was what was done in Frank's case. See the opinion of Mr. Justice Atkinson, 141 Ga., page 280.

3. The decision of the Supreme Court of Georgia holding that Frank had not adopted the correct procedure in invoking in the State Court the effect of his absence when the verdict was received was not the passage of an ex-post-facto law, but followed prior decisions.

On page 6, Paragraph 12, appellant says that:

"Under previous decisions of the Supreme Court of Georgia and under the practice which had prevailed throughout the State prior to the aforesaid decision rendered in my case November 14, 1914, as aforesaid, the proper procedure to attack as a nullity a verdict rendered in the absence of a prisoner had been held to be a motion to set aside the verdict. A motion for a new trial was treated as not being a proper remedy."

We submit that this allegation is incorrect. We cite as against the word of appellant as above quoted the decision of the Supreme Court of Georgia as appended to his application, said decision beginning on page 22. But we invite counsel for appellant to produce any Georgia authority, *where the question was presented,* sustaining this claim.

On the other hand we will endeavor, by citing the decisions of the Supreme Court of Georgia, to convince the court that it has nowhere been held as Frank contends, but that all the previous decisions of the State Courts were in harmony with and supported the decision rendered by that court in reference to Frank's particular motion to set aside the verdict.

We therefore now discuss the Georgia decisions and the motion to set aside as it was presented to the Supreme Court of Georgia when they rendered the decision embodied in the transcript, for this court from this Record has before it certainly enough of what appeared to the Georgia Supreme Court to demand the same conclusion.

In

115 Ga. 232; Regopoulos,

it is decided that the fact that the list of witnesses, on whose testimony a charge against defendant was founded, was not furnished in response to the demand of the accused but an incorrect list instead was furnished, is not ground for a motion in arrest of judgment.

The attention of the court is called to the fact that under the Constitution of Georgia, Article 1, Bill of Rights, section 1, paragraph 5, it is said that every person charged with an offense against the laws of this State shall on demand be furnished with a list of the witnesses.

We think that had Frank moved in time—i. e., during the term—by a motion to set aside or vacate the verdict, which would have been in the nature of a motion for a new trial, and governed by all the rules of said motion except as to a plea of former jeopardy, he would have made a motion recognized perhaps by the laws and which, if sustained under the facts and the law, would have enabled him to have set up on a second trial former jeopardy.

50 Ga. 272, Prescott vs. Bennett.
30 Ga. 191, (3) Lucas vs. Lucas, also page 206.
109 Ga. 359, Mize vs. Am. etc.

Undoubtedly he could have made this question in a motion for a new trial.

We insist that to have granted him a new trial on this ground, had the facts warranted the same, would have given him all the rights to which he would have been entitled.

We contend that after the term and after an adjudication on his case in the Supreme Court, he would not have been permitted to make this question, here presented, by habeas corpus.

79 Ga. 785, Daniels vs. Towers.
114 Ga. 66-7, Griffin vs. Eves.
126 Ga. 536 (1) McDonald.

Having sought and obtained an adjudication in that court he is precluded. The adjudication of the Supreme Court of Georgia, in other words, procured by Frank, now prevents any such proceeding.

79 Ga. 785, Daniels vs. Towers.
114 Ga. 65, Griffin vs. Eaves.

All matters which could have and properly should have been incorporated in a motion for a new trial are presumed to have been,

138 Ga. 740, Leathers vs. Leathers.
116 Ga. 596, Regopoulos.

Here the same case which was brought to this court on "motion in arrest," which was denied, again appears in the shape of "a motion to set aside," and the court in the first headnote said:

> "In obedience to rulings heretofore made, it is held that a motion to set aside a judgment, like a motion to arrest it, must be predicated on some defact, apparent on the face of the record. The two differ only in respect of the time at which each must be made."

The second headnote says:

> "It follows from the foregoing that a motion to set aside a judgment in a criminal case upon the ground that the accused had, upon demand for a list of the witnesses upon whose testimony the charge against him was founded, been furnished with an incorrect list, was properly overruled."

This case cites several decisions and is undoubtedly the law, affirming previous decisions, and the principle involved in this case never having been disturbed or questioned, except in a headnote decision in the 126th Ga., page 536, McDonald; the second headnote of which we confess our inability to harmonize and reconcile with the Regopoulos, in the 116th Ga., as we understand it.

But we cite the first headnote in

126 Ga. 536, McDonald,

as an authority consistent with the contention of the State in this case, because while the court in this headnote 1, refers to a judgment, it clearly shows that what they were considering, and what was being dealt with to set aside, was a *verdict.*

Some of the decisions in line with the Regopoulos, in both the 115th and the 116th Ga., which recognize those decisions and decide the law in conformity therewith, rendered since that decision, are as follows:

121 Ga. 40, Leffler & Son vs. Union Compress Co.

This case was twice before this court, the second time in 122 Ga., page 640. These two decisions, in our opinion, make the distinction clear. In 121 Ga. 40, the court rules in the first headnote as follows:

> "A motion in arrest of judgment must be predicated upon some defect, not amendable, which appears on the face of the Record."

Now in 122 Ga. 640, Union Compress Co. vs. Leffler & Son, an amendment, probably not objected to, was filed. See headnote 7, and on page 641, under the statement of the case the following, "On the return of the remittitur and before it was entered in the court below, the garnishee offered a written amendment wherein it alleged that the judgment in the garnishment case was void because the record therein disclosed—" etc., but note in the opinion by Judge Lamar this language, namely: "Judgments of every court of record may for good cause be opened, vacated or amended during the term."

These two cases establish, in our opinion, the two propositions for which we contend in this case, namely: that judgments, as is decided in the second headnote of the 122d Ga. 640, can be arrested during the term or set aside on motion after the term only for defects appearing on the face of the Record, but as stated by Judge Lamar, the court may

open, vacate, or amend, etc., *during the term.* In other words, these decisions show that the courts always make a distinction between motions made *during the term* and those not made until after the term, and they make a distinction between motions under 5957, based on the Record, and motions made under 5965, which refers to motions predicated on matters dehors the Record, and which said motions under section 5965, while they need not necessarily always be made during the term are nevertheless when made governed and controlled by principles to which we will hereinafter refer and which do not obtain in the instant case.

117 Ga. 501, Tietjan vs. Merchants National Bank.

The first headnote says: "A motion to set aside a judgment must be based upon some defect apparent upon the face of the record."

A similar case is 3 Ga. A., 178 and 184, Drought et al. vs. Pooge:

120 Ga. 578, Ayer vs. James.

The first headnote here is identical with the Regopoulos, and please see the second headnote, which is an authority for the proposition contended for by us, viz: that no matter what you may designate the motion, the court decides for itself, from the motion, what it really is.

We particularly invite the Court's consideration of the opinion by Justice Evans.

We also desire the court to note in this decision on page 582, that it appeared that "later on, on the same day, within an hour after the verdict was returned, James went to consult other counsel who *immediately prepared and presented* to the court the motion hereinbefore set forth," and Justice Evans says, to use his language: "The trial judge might well in the exercise of the *wide discretion* with which he is vested, have passed an order reinstating the case for a trial on its merits."

In other words, the motion to vacate the verdict must clearly have been made during the term, when the court was possessed of a power over both judgments and verdicts rendered, of which power the closing of the term would divest him.

1 Ga. App. 673, Georgia Railway & Electric Co. vs. Hamer; (the citations in headnotes in 1 and 2).
139 Ga. 597 (1), Moore vs. Moore & Cochran.

Of course the power of the court in the term as to judgments is to be differentiated from the court's power with reference to verdicts.

This proposition, that judgments are "in the breast of the court" during the term, is applicable alike to criminal as well as civil practice. See:

28 Ga. 235, Jobe.
53 Ga. 54, Este vs. Ivey (page 2 of opinion).
124 Ga. 912, Philips vs. Philips.
141 Ga. 799 (1), Tate vs. Little.
109 Ga. 798 (2), Moore vs. Kelley.
127 Ga. 24, Rawlins vs. Mitchell.

This case not only sustains the Regopoulos case, but stresses the fact that the motion referred to was presented at a *term subsequent* to the term at which the judgment was rendered, and after an *affirmance by the Supreme Court of Georgia* of a judgment overruling a motion for a new trial. In reference to this Rawlins case the court's attention is called to the fact that there was a verdict of guilty.

124 Ga. 31, Rawlins.

In

129 Ga. 292, Ford vs. Clark,

will be found another case. This is a case brought under section 5965, the equity section, of the Code. In the first

headnote stress seems to be put on the time at which the motion was brought, because of this language used, namely:

> "*The motion being made at the term of the court at which the verdict and judgment were entered,* and the movant showing that he was not in laches."

Judge Evans, in this case, recognizes the principle in the Regopoulos cases, but holds that for fraud, etc., a motion may be made predicated on facts dehors the record.

Our idea of the law is, that under section 5965, motions, under proper allegations as to the facts, and especially as to diligence, etc., might be brought after the term, but we do believe that it is essential, no matter what kind of a case it is, that *diligence* should always be made manifest.

See the opinion of the Court on page 295, paragraph 2.

On page 292 occurs the following statement, namely:

> "During the same term the defendant filed his motion to vacate and set aside *the verdict and judgment,—*" etc.

hence, here again, is a case where the court uses the word "judgment" embracing, as we contend, the word "verdict" also, though it will appear that the motion made referred to both the *verdict and the judgment.*

See also

119 Ga. 177, Williams vs. O'Neal, et al.

Here the Regopoulos case and others referred to by us are cited and approved.

See also the headnote under decision in

119 Ga. 615, Sweat vs. Latimer.

In

139 Ga. 597, Moore vs. Moore & Cochran,

is to be found another decision where a verdict and judg-

ment obtained by fraud, etc., were, where the movant was shown to have been diligent, set aside. Here, it will be noted, the motion referred to verdict and judgment both. This case followed after cases like Ford vs. Clark, 129 Ga. 292.

See also

139 Ga. 81, Worthy vs. Farmers Life Confederation.

We could cite other decisions since the 116 Ga., Regopoulos, but do not think that it is necessary to do so.

We did not discuss or refer to decisions prior to the Regopoulos cases, and which were cited in these decisions, but we now desire to refer to one or two cases prior to that decision.

108 Ga. 572, Longman et al. vs. Braidford.

This decision is referred to on page 592, 116 Ga., Regopoulos, where the court says that the point as to the remedy pursued does not appear to have been made, but if made this case must yield to rulings made in earlier decisions, which are cited.

From the headnote, however, it appears that the court in the case in 108 Ga. 572, considered the question as to *when* the proceedings were made. He pointed out that they must be "timely."

In

92 Ga. 440, Clark's Cove Guano Co. vs. Steed,

a verdict was involved and the motion was predicated on aliunde grounds.

In

109 Ga. 359, Mize v. Americus Mfg. & Improvement Co.,

the court holds that a motion to set aside a judgment on

the ground that one of the jury by whom the *verdict* upon which the judgment was rendered was returned, was disqualified, could not be sustained, but that the remedy in such a case was to make in due time a proper motion for a new trial.

In connection with this discussion, we will refer the court to

53 Ga. 136, Nolan, and to the same case in
55 Ga. 521.

There is nothing, as we understand these decisions, which should conflict with the position of the State, but on the other hand the State insists that on more than one question in this case these decisions are authorities for the State. In the first place they recognize the right of waiver on the part of the counsel and the defendant. That matter, however, is to be considered hereinafter.

The question presented in the Nolan case in the 53d Ga., as we understand the same, was simply as to whether or not the questions involved can be presented by a motion in arrest of judgment. The court held that it could not be made by motion in arrest. This decision was rendered in 1874.

The only proposition which the court was called upon to pass on in that case was whether or not a motion in arrest of judgment was the proper remedy, and the court said that it was not and sustained the lower court in refusing to release the defendant. Now Judge Warner, in the third headnote of this decision, went further than was necessary to a decision thereon and threw out the suggestion that the matters involved, being a fact extrinsic to the record, might be gone into on a motion to set aside the verdict.

In the first place, this was obiter. In the second place, if it be good law it must necessarily mean that Judge Warner contemplated such a motion *timely made during the term,* in a case where there was no ratification, acquiescence, waiver or estoppel.

Now the case again appears in the 55th Ga. 522. Presumably the lower court, acting on Judge Warner's obiter in the third paragraph of the decision in the 53d Ga. 139, went ahead and set aside on motion the verdict, and it is probable that no objection whatsoever was made thereto. Had there been objection, we submit that the court because such a motion to set aside was certainly made *beyond the term* at which the verdict of guilty was rendered, would have refused to set the same aside. But if that is not true, certainly the court would not have set aside the verdict had Nolan, *by a motion for a new trial not making this point,* made in these two decisions, treated the verdict of guilty as otherwise regular, legal and binding.

The decision in the 53d Ga., was undoubtedly technically correct. In this day and time, however, under the decisions in the Ford case, 129 Ga., and previous decisions referred to, the Georgia court probably without much reference to the technical designation of the motion would go to the merits of the controversy and treat the technical motion to arrest as a common-law motion to vacate or set aside in the nature of a new trial, *if it had been made during the term,* and would grant, probably, had there been no waiver or ratification, etc., the relief sought.

But, be that as it may, the decision in the 53d Ga. was right. The matter of law decided, and the law as laid down in the 55th Ga. is not now involved in any phase of this case, but the court's attention is called to the fact that both of these cases constitute strong authorities for the position of the State in this case on the question of counsel and client waiving their rights.

The Nolan case in the 55th Ga. 521, merely decided that on the second trial of the case, where the verdict had been set aside by the court and rendered null and void, the defendant could not be put in jeopardy a second time.

This, and this alone, was all, as we understand the case, that was decided. It seems to us to follow as a natural sequence and a logical conclusion that if the court had really

adjudicated that the verdict should be set aside, then the plea of former jeopardy should have been, as it was, sustained.

The Fannin case, 54 Ga. 476, while probably overruled in

128 Ga. 463, Franklin County vs. Crow (citations)

and not adopted as to other matters, (116 Ga. 597, Regopoulos), yet contains, in the opinion of Judge McCay, on pages 478, 479 and 480, expressions compatible with the State's position here presented.

In passing we will also call the court's attention to the fact that the last paragraph of the headnote shows that the court in dealing with the motion presented in this case, considered the doctrine of *estoppel and waiver and applied it.*

A decision by the Court of Appeals is to be considered, viz.:

7 Ga. App. 50, Lyon vs. State.

It is very apparent that Judge Hill, by whom Frank's motion on this petition was heard, and who rendered the opinion for the court in the Lyon case, did not, when he wrote the second headnote of the decision, have in mind the decision of this court in.

119 Ga. 396, Cawthon.

This is a strong case. The opinion written by Judge Cobb sustains the State's contention as to the right on the part of the defendant or his counsel to waive certain matters.

It will be noted that in the first headnote of this opinion the court said:

> "The defendant in no manner waived either his own right to be present in person or his right to have his counsel present when the verdict was rendered."

However, we are not now citing this case on that phase of this Frank motion.

We cite 7 Ga. App. 50, Lyon, as an illustration with reference to the method of procedure adopted which we are now considering. Judge Hill, in the course of his opinion on page 52, says that this petition *was filed at the term at which the verdict was rendered.*

Judge Hill further, in paragraph 1, on page 52, differentiates this case from the Regopoulos, 116 Ga. 596, and puts it under Ford vs. Clark, 129 Ga. 292. Our idea is that Judge Hill rendered the right decision with reference to the matter considered in the Lyon case, but gave the wrong reason therefor. The Regopoulos case was not controlling. The reason it was not controlling was because the matters dealt with in the Lyons case were brought to the attention of the court *at the term at which the verdict was rendered.* The decision of the Court of Appeals in this case, we submit, should have been in principle put upon the broad proposition that the *motion was made at and during the term, and that the motion was in the nature of a motion for a new trial.* It should never have been put under the case of Ford vs. Clark, 129 Ga. 292, and other kindred cases, because those are cases where the right of action was predicated on the section of the Code hereinbefore referred to, which permits the court, where fraud, etc., has been shown, to set aside verdicts, *after the term.*

In the Regopoulos case in the 115 Ga. 232, it will be noted that the accused moved to rule out certain testimony, asked for the direction of a verdict of acquittal, and asked for a discharge, which motions were refused, and that he did not at any time ask to have a mistrial declared. In the 115 Ga., Regopoulos, the defendant, having failed to timely move for a mistrial, *waived that right.* It will be noted in this case in the 115 Ga., that Regopoulos had also made a motion for a new trial, which was overruled, and which was expressly abandoned, and hence this conduct constituted a waiver. And, therefore, when the Regopoulos case in the 115th Ga. got up to the court it was one involving,

just exactly like this Frank case did, a technical question, pure and simple. And remember that the Regopoulos case in the 116 Ga. came up on a motion made *after the term and after* all these matters referred to in the 115 Ga., Regopoulos, had transpired.

Hence we say that the Court of Appeals, in the Lyon case, in the 7th Ga. App., did right to differentiate that case from the Regopoulos case, but fell into error in trying to analogize the matter presented to the other cases referred to in the opinion. Our position is that it should have been dealt with by the court as a motion *made during the term*, and to use the language of Judge Hill, as "a petition to vacate and set aside a verdict."

We think also that Judge Hill was wrong when he used the following *obiter* on page 53, viz.:

> "We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. . . . The error is hardly one that would be properly made in a motion for a new trial," etc.

This question was not involved or necessary for a decision of the Lyons case.

In 13 Ga. App. 440, Miller, a similar matter was dealt with in *a motion for a new trial.*

In 13 Ga. App. 135, Bentford vs. Shiver,

will be found several expressions, both in the headnote and in the body of the decision, which support our contention. See headnote 2, page 136. In the body of this headnote this language is used, viz.:

> "A judgment which depends entirely upon the fact that the court erred in refusing a continuance, may, upon a proper showing, be set aside for this irregularity, just as a judgment obtained by fraud or by perjury may be set aside upon a *timely* and

proper motion filed *at the term* at which the judgment was rendered, though neither perjury nor fraud appears from the record."

We do not believe that so far as fraud or perjury are concerned it is necessary to make the motion at the term. However, in headnote 3, it appears that this motion considered in Bentford vs. Shiver was filed *at the term at which the verdict was rendered,* and the movant showed that he was not in lache, etc. See also the opinion of the court on page 138. The case of

Mobley, 9 Ga. 247,

referred to, was a case under the equitable section of the code, and if we understand, as we said with reference to the decision of Judge Hill in the Lyons case, the court, in writing this opinion, 13 Ga. App., confused the law as contained in the Ford case, in the 129th Ga., and the Mobley case.

In the closing paragraph of this decision, on page 139, however, the judge rendering the opinion says:

"Whether the rule would apply after the adjournment of the term at which judgment was rendered or not, we are clear that *during the term* at which it was returned the proper motion might be filed—and the judgment might be set aside."

Thus it was that the court in this opinion almost made the distinction for which we contend. Clearly, if the motion then being considered in this case was one that came under the principle set out in Mobley, Ford, Union Compress Co., Ayer vs. James, and other decisions, the court would have had no doubt about such a motion being brought subsequent to the term at which verdict or judgment complained of were rendered.

We have several times in this brief made reference to the fact that what is sometimes called a motion to set aside

for matters extrinsic to pleadings or record, are to be likened unto motions for new trial, and substantially are the same in form and effect.

This proposition is virtually stated in the language of Chief Justice Warner on page 272 of the 50th Ga., Prescott vs. Bennett.

In this connection see:

60 Ga. 353, Dugan vs. McGlann.

With reference to the

67 Ga. 604, Turner vs. Jordan,

it is only necessary to call the court's attention to what is said by Judge Cobb in the Regopoulos case, 116 Ga. 597. In other words, if that case is not taken out of the general rule, as indicated by Chief Justice Jackson, in Dugan vs. McGlann, 60 Ga. 353, it is then clearly in conflict with the earlier decisions.

6 Ga. App. 403, Hopkins vs. State.

Here the sheriff permitted the jury to disperse and the defendant was released. On page 404 it appears that "*before the adjournment of the court the defendant* filed a motion for a new trial, . . . and also *filed a motion for his discharge* upon the ground that he had once been placed in jeopardy."

It will be noted that the court in the second headnote says that this amounted to a mistrial declared without the consent of the defendant, under the facts obtaining.

We deem it unnecessary to further cite authorities because we believe that whether we are right or not the foregoing citations, in conjunction with what we have said, make plain our position.

We will here briefly re-state the same:

Frank could have made this point in a motion for a new trial. He could have under the authorities cited probably

made it by a motion to vacate and set aside the verdict, had such motion been made *at and during the term*, and before he *had acquiesced, ratified* and *waived* whatever rights he had, and he could have made the point before an adjudication on his original motion in this court, by habeas corpus.

79 Ga. 785, Daniels vs. Towers.

Having failed to timely move, he is precluded.

We do not believe that the equitable section of the Code gave to him any right whatsoever. See:

7 Ga. 422, State vs. Jones,

where it is said that even the State might have a writ of error when the acquittal of the defendant is affected through his fraud, or misconduct, citing 1st Chitty's Criminal Law, page 657.

But if it should be held that it did give him a right, then, as hereinbefore indicated, said right was coupled with the equitable corollaries as to moving timely, not waiving anything, etc.

93 Ga. 793, Reab vs. Sherman.
Secs. 4358-4359, Code of 1911.

We believe that no case will be found in the books not in entire harmony with the position assumed by the State in this case, and on the other hand we do not believe that the contention of Frank could be entertained without doing violence to well-established principles of law already definitely laid down. And we believe that while it is essential to give every defendant all constitutional rights guaranteed to him when they are not waived, still we also believe that for the good of society and in the interest of government, and the due administration of the law, it is more important that there should be always timely presentation of such questions as are here made, and that the movant who seeks a strict legal enforcement of the constitutional guaranties should come into court, in asking protection under the law, in strict conformity with the law.

We have not encumbered the record with the citation of foreign authorities on this proposition because it is one involving our State practice, but we will state that the authorities in other jurisdictions are all to the effect that verdicts and judgments rendered *during the term* are on a different footing, as to being set aside, than *after the term.*

We pass now from the questions of procedure.

4. A brief discussion of the decision of the Supreme Court of Georgia on the merits.

It appears that the agreement of counsel that Frank not be present at the reception of the verdict was made in the interest of Frank and for his protection; it appears that the jury *was polled,* and polled under an agreement with counsel when they made *their waiver.*

We submit that it would be impossible to find in the books or imagine a more complete case of *waiver, estoppel, ratification* and *acquiescence* than is here presented.

We submit that it has been practically decided *on principle* in every decision in the Supreme Court of Georgia, and in the Court of Appeals, that the defendant is possessed of such right. If it be considered in this matter that originally counsel would not have the right to have waived this defendant's presence, still if there is any such thing in the criminal law as ratification, acquiescence and estoppel, it is applicable under the facts here presented.

These decisions all show that Frank was treated as have been all others.

The United States Court decisions are all predicated on special statutes and a peculiar practice obtaining whereby the prisoner immediately upon entering upon his trial is taken into custody by the marshal. But it is very probable that this court, were this still an open question in this

form, would decide the question differently. This is indicated in the case of:

Garland vs. State of Washington,

to be found in the U. S. Supreme Court Advance Opinions published in Pamphlet 10, April 15, 1914, page 456.

Among other things, the court, in discussing the technical proposition submitted in this case, which was analogous to the proposition here submitted, says:

> "Technical objections of this character were undoubtedly given much more weight formerly than they are now."

As showing the attitude of this court toward waivers on the part of the defendant, the following language is important, viz.:

> "He ought to have been held to have waived that which under the circumstances would have been an unimportant formality. A waiver ought to be conclusively implied, where the parties had proceeded as if the defendant had been duly arraigned—," etc.

Further,

> "It would be inconsistent with the due administration of justice to allow a defendant to lie by and say nothing as to such an objection," etc.

This decision is also to be found in
34 Sup. Ct. 456,

and a discussion of this case will also be found in Volume 78, Central Law Journal, page 311, Pamphlet No. 18.

The United States Court rules are different from Georgia's, in that the record must show affirmatively the prisoner's presence.

36 U. S. Supreme Court, 1011 (note), Lewis vs. U. S.

The Federal courts, in determining the question as to cases arising in the Federal Court, make their own interpretation, etc., but in determining a question of due process of law in cases arising in State courts, they apply the State's interpretation of the meaning of due process of law.

92 U. S. 90 and 93 (book 23, page 678), Walker vs. Sauvinet.

In the cases of *Lewis* and *Hopt*, cases which were cited and probably will be again cited here, are just as much authorities for the proposition that the presence of the defendant should appear on the record as they are with reference to the proposition of due process of law.

But in the Rawlins case, in the 127th Ga., and other Georgia cases, the court holds that such matters do not have to appear of record.

What is due process of law is regulated by the State, and the Georgia authorities, which are controlling, have on many questions held the reverse of the United States Court.

119 Ga. 395, Cawthon.
51 Ga. 567, Martin.

This case recognizes the right of waiver in criminal cases.

96 Ga. 431, Tiller.

What is due process of law in the States is regulated by the law of the State.

92 U. S. 90 and 92, Walker vs. Sauvinet.
169 U. S. 586; 42 L. Ed. 865 (2), Wilson vs. N. C.

Due process of law, within the meaning of the 14th Constitutional Amendment, is secured if the laws operate on

all alike, and do not subject the individual to an arbitrary exercise of the powers of the government.

148 U. S. 657 and 662, Giozza vs. Tiernan.
136 U. S. 436, In Re Kemmler.
96 U. S. 97, Davidson vs. New Orleans.
187 U. S. 51, Turpin vs. Lemon.
110 U. S. 516 and 558, Hurtado vs. People of California.
199 U. S. 434; 50 L. Ed. 260, Rogers vs. Peck.
177 U. S. 231; 44 L. Ed. 748, Louisville & Nashville Railroad Company vs. Schmidt.

We will cite a few of the cases decided by the Georgia courts where the doctrine of waiver and ratification is recognized and applied in criminal cases.

In 119 Ga. 395, Cawthon, we have a case which sustains the State.

The 9th headnote is conclusive of this case.

It appears from Frank's petition that his counsel made a waiver of his presence. It appears that he ratified the same and allowed the court to act upon the waiver after he had notice that the same had been made.

The law of Georgia is set out in the 9th paragraph of the headnotes, and it is to the effect that before a verdict received in the absence of the accused will be held to be invalid it is incumbent upon the accused to show . . . that he did not ratify the same or *allow the court* to act upon the waiver of counsel after he had notice that the same had been made, both of which Frank did.

The opinion of Judge Cobb covers the propositions involved in the instant case, and the authorities cited are incorporated hereby in our brief. We content ourselves with quoting the following from Judge Cobb's opinion, to be found on page 413, viz.:

> "It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act."

The Nolan cases in the 53d and 55th Ga. Rep., hereinbefore cited, recognize and apply the doctrine of waiver. Indeed the whole question grew out of a waiver on the part of the counsel which the Court seemed to treat as valid.

The decision in the 55th Ga. 521, headnote 3, recognizes the right of the prisoner to consent.

Able counsel representing Nolan in that case seemed never even to have suggested for the court's consideration that *they did not have the right to make for their client a waiver,* and there was no question of waiver like we have here at all involved in this Nolan case, because it was not contended that Nolan himself or his counsel agreed that the verdict should be returned during his absence on the day it was rendered. The only agreement made was with reference to what should be done with the verdict "*that night.*" No agreement whatsoever was made that a verdict should be brought into court the *next day,* in the absence of the defendant and his counsel, which happened, and out of which grew these cases.

That is a wholly different proposition from the matter here presented.

See

59 Ga. 514, Smith.

This recognizes his right of consent. The court is respectfully referred to Justice Bleckley's opinion on page 515.

51 Ga. 567, Martin,

recognizes the right of waiver, but says, with which position we take no issue, that it must be "*a clear and distinct waiver.*"

We submit that the law as to that is correct and that the facts involved in the case make, under the allegations of this petition, a very clear and distinct waiver, and an un-

usual and unmistakably clear case of ratification and acquiescence.

In

87 Ga. 583, Wilson vs. State,
Judge Bleckley cites the case of

12 Ga. 25, Wade.

The decision in the Wilson case was right because to use the language of the Judge in this opinion:

> "There is nothing to indicate that it was his intention to be absent when any material step was to be taken in the trial."

This decision indicates that if there had been anything to indicate such intention it would not have been illegal. And the Wade case, in the 12 Ga. 25, cited by Judge Bleckley in this case, says, in the second headnote, that it is error to do certain things *without the consent of the prisoner's counsel.*

Thus again it would appear that as far back as the 12th Ga., similar questions were dealt with and without any suggestion from the court that in this jurisdiction matters like this could not be waived.

In

96 Ga. 430, Tiller vs. State (1)

the decision is predicated under the facts, on the proposition that there was no *waiver, express or otherwise, either by himself or his counsel.*

Thus it would appear that the court, in 1895, recognized the right of waiver.

When the accused is on bail, he is presumed by virtue of his voluntary absence from the courtroom, to have waived

his right to make any objection to the validity of the trial, because of his absence, etc.

On principle, we submit, there is no difference, where the defendant is on bail and is presumed to have waived his rights, and a case where those rights are waived when he is in the custody of the law. It all depends on whether or not there was a waiver.

13 Ga. App. 440, Miller.

Headnote No. 2, in sub-paragraph 2, shows a clear case of *waiver*. On page 445, the Court of Appeals, cites several decisions of the *Supreme Court* where the defendant waived by *his silence and failure to make timely objection*, certain rights, and says:

> "Many rights involving a fair and impartial jury trial may be waived, either by the *conduct of the accused*, or *his counsel, or by their silence.*"

Then follow certain pertinent citations, and then:

> "The accused and his counsel should not be allowed to take their chances of a favorable verdict with knowledge of an irregularity, and after losing set up such an irregularity as a ground for a new trial."

Now if that be, as we insist it is, a sound proposition of law, then is it not equally sound to say that where a defendant treats a verdict as legal and binding, by a motion for a new trial, and again in a second effort by the unusual method of an extraordinary motion, he must necessarily be held as waiving all points which he could have made, but failed to make?

In the same opinion Judge Russel says, citing a Supreme Court decision as authority, "that one accused of crime can waive any of his rights or all of them, and where he remains silent and takes the chances . . . he cannot after . . . ask that that right be accorded him."

And Judge Pottle, in the same case, concurring specially, says that this case in the 13th Ga. App., is different from the Hopson case in 116 Ga. 90, in that in the Miller case counsel "sat silent and for eleven hours with knowledge," etc.

In our case counsel were unusually active and vigilant in pressing motions which dealt with the verdict as legal and binding, except in the particulars indicated in this application, and thus by their conduct necessarily known to Leo M. Frank they have in the most incontrovertible and indisputable manner precluded their client.

136 Ga. 67, Richards.

In this case defendant's attorney absented himself voluntarily. There was no suggestion of any waiver except the implied waiver by the voluntary absence. Defendant was in court, but no other counsel were appointed. The reception of the verdict under those circumstances was complained of in a motion for a new trial, but the court declined to set the verdict aside.

The court gives the wrong citation in the 135th Ga. It should be 135 Ga. 654, Roberson.

In

129 Ga. 170, Bagwell (1)

the court uses this language: "*after the consent of the accused.*"

It is held here that where a mistrial has been properly declared the prisoner may be again tried (see authorities on page 174 in this Bagwell case). We submit that hardly in the history of the State has it ever been imagined by any attorney at the bar or judge presiding that counsel would not have the right to agree with the court to declare a mistrial. The court would conclusively presume authority to do so.

If any other doctrine than that should be established, instead of courts relying, as they have always done and

do now, upon the integrity of counsel representing the defendant and upon said attorney's judgment to do what is best for the defendant, the court would establish a rule which would necessitate that the word of counsel as to the conduct of the case would not be accepted or acted upon and thus a law would be enforced which would not only unnecessarily hamper and delay the expeditious handling and disposition of criminal matters, but the judge would be in the attitude of not being able to trust implicitly, as he should, counsel in the management and direction of the case.

If the court must verify every move made by the attorney, the court would arouse, by constant inquiry of the client as to whether or not he would agree and acquiesce in matters agreed to by his counsel, a suspicion in the client that the court mistrusted the lawyer in whom the prisoner had placed his confidence, both as to his integrity and his ability to properly look after his interest.

138 Ga. 349, Baldwin.

The court's attention in this case is called also to the fact that the question presented was made in *a motion for new trial.*

6 Ga. App. 403, Hopkins.

In this case the court refers to the fact that the irregularity was without the consent of the defendant.

Clearly the court, in deciding this, were of the opinion that if there was a waiver the results announced would not have followed.

In this case the court's attention is called to the fact that before the adjournment of the court a motion for a discharge was made.

There is nothing in the

67 Ga. 653, Barton,

which prevents the State's position being upheld.

Says the court on page 656 of this opinion—

> "The presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury."

In

67 Ga. 510, Bonner,

nothing is decided which militates against our position, but it will be noted that this case presented the question involved through the medium of a *motion for a new trial.*

In

11 Ga. App. 30, Ezzard,

the record itself disclosed a verdict of acquittal.

11 Ga. 630, Mitchum,

says that the attorney represents his client—and is the substitute of his client. Whatever the client may do in the conduct of his case therefore his counsel may do. This, it is true, is merely obiter, but it lays down a proposition running all through the decisions of our Georgia courts.

70 Ga. 264, Durham (4).

Under paragraph 4, in the headnotes, is to be found this language, viz: "The direct waiver of defendant's counsel was binding on him."

Please see authorities cited for this position by the court, as set down on page 267.

39 Ga. 719 (6) Hoye.
This headnote 6 recognizes the right of waiver.

7 Ga. App. 50 (1), Lyons.

In this headnote the court says:

> "The defendant in no manner waived either his

own right to be present in person or his right to have his counsel present," etc.

Judge Hill, in paragraph 3, page 54, says:

> "In this State the defendant can waive *any right guaranteed to him by the law or the Constitution;*" citing
>
> Wiggins vs. Tyson, 112 Ga. 750.

The question of waiver is involved in

> 54 Ga. 476, Fannin vs. Durden.

See the latter part of the headnote.

> 112 Ga. 744 (2), Wiggins vs. Tyson.

See opinion of the court, pages 749 and 750, where the court says:

> "One may even waive his right to a trial and enter his plea of guilty and be imprisoned. . . . Mr. Bishop, in his work on criminal law, section 995, declares there are very few exceptions to the rule that a defendant in a cause may waive any right which the law has given him, even a constitutional one. . . . It is declared in section 5 of our Penal Code that a person may waive or renounce what the law has established in his favor, where he does not thereby injure others or affect the public interest."
>
> 9 Ga. App. 553, Schumpert.

In

> 118 Ga. 24, Hill,

the Supreme Court uses this language:

> "We have yet to learn of a case holding that the right (to be present at the rendition of the verdict) cannot be waived *by the accused or his counsel.*"
>
> 79 Ga. 785, Daniels vs. Towers,

has already been cited on another question and is a very strong case on the proposition of waiver.

43 Ga. 270, Deen vs. State.

The American and English Encyclopedia of Pleading and Practice, Volume 22, page 929, paragraph C, says: That the greater number of decisions hold that the right to be present at the reception of the verdict may be waived by a defendant in a criminal prosecution, and that there may be constructive as well as actual waiver.

It would not be profitable to cite cases involving analogous propositions, but among others where important rights have been *waived* we will refer the court to the following:

122 Ga. 568, Rhodes vs. State.
81 Ga. 480, Smith.

These cases hold that if witnesses are allowed to give their evidence not under oath, it is evident that the defendant waives the fact that they are not sworn.

The jury were polled and to get this was the main reason why the defendant should have been present.

67 Ga. 653, Barton vs. State.
58 Ga. 513, Smith.

If that be true, then it seems to us that the doctrine of harmless error, as contained in:

13 Ga. App. 444,

would apply. The court in that decision says:

> "In considering the right of the accused to be present at every stage of the trial and to have his counsel present, we must not lose sight of the further principle, equally well established, that a new trial will not be granted on an error *which manifestly caused no injury to the accused.* It would be trifling with justice to set aside a verdict clearly and strong-

ly supported by the evidence, solely on the ground that such an error had been committed by the trial judge. To warrant such action by the reviewing court it must be *manifest that the error was prejudicial in character,'' etc.*

See also

135 Ga. 654, Roberson vs. State,
and see the opinion of the court on page 655.

Page 456 U. S. Advance Opinions, Garland vs. Washington, Pamphlet 10.

In view of the foregoing decisions of the Supreme Court of Georgia and the other courts, rendered previous to the decision of the Frank case, can it be said that the decision of the Georgia court constituted a passing of an *ex-post-facto* law in violation of the prohibition contained in article 1, section 10, of the Constitution of the United States, as Frank claims in his application for a writ of habeas corpus?

5. Every question presented by the application for habeas corpus having already been presented by him to the State Court and its decision invoked and its judgment rendered adverse to him, the principle of res adjudicata applies, and for that reason alone the questions cannot be reopened here.

Let us next examine the decisions, which we conceive to be applicable to the foregoing statement and discussion. It is reasonably well settled that where one is indicted and tried under an unconstitutional statute he may, even after final trial, conviction and sentence obtain his discharge on a writ of habeas corpus and he may in like manner be discharged under an indictment based upon a statute repealed prior to the commission of the alleged offense.

Moore vs. Wheeler, Sheriff, 109 Ga. 62; citing

Ex parte Siebold, 100 U. S. 371.
Ex parte Clark, Ibid, 399.
Ex parte Yarbrough, 100 U. S. 651.
Ex parte Royal, 117 U. S. 241.
In re Ziebold, 23 Fed. Reporter 791.
In re Tieloy, 26 Fed. Rept. 611.
In re Ah Jow, 29 Fed. Rept. 181.
In re Payson, 23 Cassas 757, 760.
Ex parte Burnett, 30 Ala. 461.
Ex parte Rollins 80 Va. 314.
Ex parte Rosenblatt, 19 Nevada 439.
Ex parte Mato, 19 Tex. App. 112.
Brown vs. Duffus, 66 Iowa 193.
Fisher vs. McDirr, 1 Gray 2.
Whitcomb's Case, 120 Mass. 118.

The Supreme Court of Georgia is thoroughly in accord with the above proposition.

Griffin vs. Evans, 114 Ga. 65.

And yet the last named court in the case last cited has held that:

> "Where the accused upon the trial brings in question the validity of the statute under which he has been indicted and the point is decided against him, then, of course, it becomes *res adjudicata* and cannot be reviewed collaterally on habeas corpus."
> Griffin vs. Evans, 114 Ga. 67.

In support of the foregoing proposition we cite:

Caverly vs. McOwens, 126 Mass. 222.

In the last headnote in the case of

Glasgow vs. Moyer, Warden,

the case decided as recently as June 7, 1912, the Supreme Court of the United States says:

"A defendant in a criminal case cannot reserve defenses which he might make on the trial and use them as a basis for habeas corpus proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice."

Mr. Justice McKenna, after discussing several former opinions of the court, uses this language:

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is vested with jurisdiction to try if raised, and its decision can be reviewed like its decisions upon other questions, by writ of error. The principle of the cases is the simple one, that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to retry the issues, whether of law, constitutional or other, or of fact."

In concluding the opinion, it is said:

"It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict."

Glasgow vs. Moyer, 225 U. S. 420, 430.

It is to be observed that in Glasgow vs. Moyer, this court was dealing with a habeas corpus seeking to discharge a prisoner held under a conviction under a United States statute by a United States court. If dealing with such a conviction it be true that "it would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of

attack upon the judgment after the trial and verdict," how much more forceful does the proposition become when the judgment of conviction was had in a State court and the application for habeas corpus is presented to a United States Court.

> "Federal Courts should not by habeas corpus interfere with the regular course of justice in a State court, unless in cases of peculiar urgency."
>
> Baker vs. Grice, 169 U. S. 284.

> "Except in . . . peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. Ex parte Royall, 117 U. S. 241; Ex parte Fonda, 117 U. S. 516; In re Duncan, 139 U. S. 449; In re Wood, 140 U. S. 278; In re Jugiro, 140 U. S. 291; Cook vs. Hart, 146 U. S. 183; In re Frederich, 149 U. S. 70; New York vs. Eno, 155 U. S. 89; Pepke vs. Cronan, 155 U. S. 100; Bergemann vs. Backer, 157 U. S. 655."
>
> Whitten vs. Tomlinson, 160 U. S. 231, 242.

> "Upon the State courts equally with the courts of the union rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof whenever those rights are involved in any suit or proceeding before them."
>
> Robb vs. Connally, 111 U. S. 624.

In American and English Annotated Cases, Volume 14, page 753, there is reported and annotated the case of

The People ex rel. Stead et al. vs. Superior Court.

The original report of this case is:
234 Ill. 186.

We quote from the headnotes:

> "When a judgment is approved by the Supreme Court all questions raised by the assignment of error and all questions that might have been so raised, are to be regarded as finally adjudicated against the appellant or plaintiff in error, and the judgment formed must be regarded as free from all error."

6. Where oral evidence is required to show want of jurisdiction, habeas corpus will not discharge the prisoner.

It would make this brief too long to quote at length from the decisions and for that reason we content ourselves with a citation of these cases, but call attention of the court to the interesting note on the question we are now discussing in the report of the case in American and English Annotated Cases, Volume 14, pages 753, 758.

> "Where a prisoner is held under a judgment of conviction by a court and the indictment against him states the case and is based on a valid existing law, habeas corpus is not an available remedy, save for want of jurisdiction appearing on the face of the record of the court wherein he was convicted."
>
> Daniels vs. Towers, 79 Ga. 785.
>
> Ex parte John Parker Bronk vs. State of Florida, 43 Fla. 461.
>
> Bray vs. State, 140 Ala. 172.
>
> Ex parte Columbia George, 144 Fed. 985.
>
> Ex parte Stephen, 114 Cal. 278.
>
> In re Clarke, 66 Mass, 320.
>
> Commonwealth ex rel. Davis vs. Lecky, 26 Am. Dec. 37.

and particularly 144 Fed. 985, Ex parte Columbia George.

Applying the principle thus ruled to the facts here, we say that every point now raised by Frank in the application

now before the court is *res adjudicata* and cannot be reviewed collaterally on habeas corpus.

7. The writ of habeas corpus cannot be made use of to perform the functions of a writ of error.

It has been too frequently decided to be now open to question that a writ of habeas corpus cannot be made use of to perform the functions of a writ of error.

Re Lennon, 166 U. S. 552.
Re Ekhart, 166 U. S. 481.
United States vs. Pridgeon, 153 U. S. 48.
Reid vs. Jones, 187 U. S. 153.
Ex parte Bigelow, 113 U. S. 328.
Re Belt, 159 U. S. 40.
Storti vs. Mass., 183 U. S. 138.
Re Tyler, 149 U. S. 164.
Re Cuddy, 139 U. S. 280.
Ex parte Terry, 128 U. S. 289.
Ex parte Kearney, 7 Weat. 38.
Re Schneider, 148 U. S. 162.
Re Debbs, 158 U. S. 564.
Ex parte Watkins, 3 Peters 193.
Ex parte Yarbrough, 110 U. S. 651.
Re Swan, 150 U. S. 637.
Ex parte Fish, 113 U. S. 713.
Dykes vs. Hover, 20 How. 81.
Ex parte Reed, 100 U. S. 13.
Ex parte Parks, 93 U. S. 18.
Ornealas vs. Ruez, 161 U. S. 502.
Markuson vs. Boucher, 175 U. S. 184.
New York vs. Eno, 155 U. S. 89.
Baker vs. Grice, 169 U. S. 284.
Church on Habeas corpus, 2d Ed. Secs. 356, 363.
Felts vs. Murphey, 201 U. S. 123.
Glasco vs. Moyer, 225 U. S. 420.

8. Irregularities, no matter how gross, will not be sufficient to obtain a release on habeas corpus.

It is equally as well settled that mere irregularities however gross in the judgment or the proceedings upon which the judgment was found will not be sufficient to obtain a release on habeas corpus.

15 American and Eng. Encyclopedia of Law, 2d Ed., page 172.
Church on Habeas Corpus, 2d Ed., paragraph 363.
Glasgo vs. Moyer, 225 U. S. 420.

The foregoing proposition holds good even though a constitutional right is invoked:

Ex parte Harding, 120 U. S. 782.
Kohl vs. Lehlbad, 160 U. S.
Church on Habeas Corpus, 2d Ed. 364.

We next come to a discussion of due process of law as applied to the instant case.

9. A discussion of due process of law. The incorporation of the due process clause in the Fourteenth Amendment does not result in an overturning of well-settled principles and established usages prevailing in States, nor to deprive the States of the power to establish other systems of law and procedure, or alter the same at their will.

Confessedly that clause in the 5th amendment has no application here. It is the 14th amendment which makes it applicable. This 14th amendment transferred from the State court to the Federal court the ultimate decision as to the validity of all proceedings affecting life, liberty, or property. This feature of the case was dealt with so forcibly and clearly by the Supreme Court of Georgia that we shall in the main content ourselves with that part of the opinion of Mr. Justice Hill which deals with this phase of the matter.

"Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertable with the older expression 'the law of the land.' The basis of due process, orderly proceedings, and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the state of uncontrolled vengeance." McGehee on Due Process of Law, 1, citing Chicago, etc., R. Co. vs. Chicago, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. ed. 979). On page 35, this same author says: "Before the passage of the Fourteenth Amendment the security of the citizens of the several States for due process of law in proceedings by the State lay in its institutions alone. Even if due process was denied, the Federal government had no right to interfere. The Fourteenth Amendment changed this condition of affairs. It made it a matter of national concern that the State should not deny due process of law to its citizens and to others. It gave to the United States the right to supervise the performance of this duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty and property. But under the amendment the authority of the Federal court is merely to determine whether the State by some official action has provided due process or has failed in that duty; and if a denial of due process appears, it can only pronounce the proceedings void. The power of the Federal government ordinarily ends with that act. Thus the primary duty of providing for the protection of life, liberty and property by due process of law rests still with the State, and the

Fourteenth Amendment operates merely as a guaranty additional to the State constitutions against encroachments on the part of the State upon fundamental rights, which their governments were created to secure. It did not radically change the whole theory of the relations of the State and Federal governments to each other and of both governments to the people." [See United States vs. Cruickshank, 92 U. S. 542 (23 L. ed. 588): In re Kemmler, 136 U. S. 436-438 (10 Sup. Ct. 930, 34 L. ed. 519).] "The Federal Supreme Court has again and again declared that when the highest court of a State has acted within its jurisdiction and in accordance with its construction of the State constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court may feel justified in saying that there has been a failure of due process of law. 'We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference. For especially in cases involving procedure, is it true that 'due process of law means law in its regular course of administration through courts of justice.' " McGehee, Due Process of Law, 167, citing Allen vs. Georgia, 166 U. S. 138 (17 Sup. Ct. 525, 41 L. ed. 949), which case is cited with approval in Wilson vs. North Carolina, 169 U. S. 586, 595 (18 Sup. Ct. 435, 42 L. ed. 865). In Rawlins vs. Georgia, 201 U. S. 638 (26 Sup. Ct. 560, 50 L ed. 899, 5 Ann. Cas. 783), it was contended that because many lawyers, preachers, doctors, engineers, firemen and dentists were excluded from jury service in Georgia by the jury commissioners failing and refusing to put any of the names of the classes excluded in the jury box, that the defendant had rights under the Fourteenth Amendment. In delivering the opin-

ion of the court in that case, Mr. Justice Holmes said: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the State constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the State court that the local provisions had been complied with. This is a mistake. If the State constitution and laws as construed by the State court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is whether a State could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

At the time this brief is being prepared we have not the benefit of a perusal of the brief to be presented by counsel for appellant to this court, and we can only anticipate his contentions of law, insofar as he presented them on other trials wherein the same points were pressed.

It has been insisted, heretofore, in this case that in order to measure any action of the court in order to see whether it affords due process of law, we are to look to those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors.

Were we to use this as an infallible test it would lead us into error. The fact that a statute denies a trial by jury in cases where a jury trial was required at common law affords no lack of due process of law.

Walker vs. Sauvinet, 92 U. S. 90.
French vs. Barber Asphalt Paving Co., 181 U. S. 324.

It has likewise been held by the Supreme Court of the United States that the words "due process of law" in the Fourteenth amendment do not necessarily require an indict-

ment by a grand jury in prosecution by a State for murder.

Hurtado vs. California, 110 U. S. 516.

The following extract from a unanimous decision of the court delivered by Mr. Chief Justice Fuller is pertinent to the inquiry now under discussion:

> "But the privileges and immunities of citizens of the United States protected by the Fourteenth Amendment are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and 'due process of law' and the 'equal protection of the laws' are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan vs. Mo., 152 U. S. 377, 382.

Again we quote the language of Mr. Chief Justice Fuller speaking for a unanimous bench, as follows:

> "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, re-

quires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. Barbier vs. Connally, 113 U. S. 27, 31."

In re Kemmeler, 136 U. S. 436, 448.

In the recent case of Garland vs. State of Washington, 232 U. S. 642 (34 Sup. Ct. 456), it was held that:

"A conviction upon a second and amended information, after a prior conviction under the original information had been set aside and a new trial granted, was not wanting in the due process of law guaranteed by U. S. Const., Fourteenth Amendment, because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty." In delivering the opinion of the court (which was unanimous), Mr. Justice Day said in part: "Due process of law, this court has held, does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers vs. Peck, 199 U. S. 425, 435 (50 L. ed. 256, 26 Sup. Ct. Rep. 87), and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a State, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in

the trial court. . . . Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the prosecution of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case [162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097], when he said (page 649): 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'" See Trono vs. United States, 199 U. S. 521 (26 Sup. Ct. 121, 50 L. ed. 292, 4 Ann. Cas. 773). Authorities might be multiplied to the effect that if the State laws as con-

strued by the State courts are not inconsistent with the provisions of the Fourteenth Amendment, that there is no denial of due process of law within the meaning of that provision of the Federal Constitution.—See Record, pages 27, 28 and 29.

Speaking of 'due process of law' the editor of Michie Encyclopedia of U. S. Supreme Court Reports in Volume 5, pages 509 and 510 says:

" 'The meaning is that it was not intended, by the incorporation of this provision into the constitution of the United States, to overturn well-settled principles and established usages prevailing in the states, nor to deprive the states of the power to establish their own systems of law and procedure, legislate concerning offenses against the same, and to alter the same at pleasure; that it was not intended to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians; that while a process of law not otherwise forbidden must be taken to be due process of law if it can show the sanction of settled usage both in this country and in England, it by no means follows that nothing else can be due process of law. It was the characteristic principle of the common law to draw its inspiration from every fountain of justice, and it is not to be assumed that the sources of its supply have been exhausted. In administering these provisions of the constitution, therefore, the court recognizes the fact that the law is, to a certain extent, a progressive science; that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to prevent the states from amending their laws to suit the changing needs of society or

from adopting such systems of jurisprudence and forms of procedure as they may deem best suited to their needs and purposes.' "

In support of this view he cites a great number of cases.

We further quote from the same author on page 511 of the same volume:

> " 'Nevertheless, it is stated that the answer to this must be two-fold; namely, that we must examine the constitution itself to see whether the law or the process provided be in conflict with any of its provisions, and if not found to be so, we must look to those settled usages and modes of proceeding existing in the common statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. In other words, a process which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country, though, as previously stated, it by no means follows that nothing else can be due process, for, as we have just seen, the constitutional prohibitions were not intended to restrict either congress or the states to common-law modes and usages, or to deprive the states of the power to adopt, alter or amend their own systems of law and procedure.' "

In support of the text the following decisions from this court are especially pertinent:

Missouri vs. Lewis, 101 U. S. 22, and specially pages 30 and 31.

Murphey vs. Mass., 177 U. S. 155, and specially the language used on page 163.

West vs. Louisiana, 194 U. S. 259, and the briefs

accompanying the last named case as published in 48 Law Ed. of the Supreme Court, reported on page 965.

The editor of the Columbia Law Review, in the issue of February, 1915, on page 166, has a note on the "presence of the defendant at the rendition of the verdict in felony cases" which is copiously annotated. He treats it absolutely as a question of procedure, and concludes the note in these words:

> "In the absence of exceptional circumstances, therefore, the determination by the State court that the right to be present can be waived would seem to be conclusive of the question, especially since the right is one which does not go to the very essence of criminal procedure."

There is also a discussion in the Central Law Journal, of the issue of January 8, 1915, on page 29, of the contention of appellant that he was deprived of due process of law because he was not present in the court when the verdict was rendered. The contributor of this article, a New York lawyer, cites many pertinent authorities, and argues strongly for the proposition that such contention is untenable.

10. Does the Fourteenth Amendment require the presence of a defendant in Court at the reception of a verdict?

We next will examine such decisions—mainly of the Supreme Court of the United States—as seem most pertinent to a solution of the question which Mr. Justice Lamar, in his opinion allowing the appeal (see record, page 230), says have not been decided by this court.

The first of these is the case of Hopt vs. Utah, decided in 1884, and reported in 110 U. S. 574. It will suffice us to quote the forceful and pertinent comment made by the

contributor to the Central Law Journal, in his article above referred to, to-wit:

> "See Hurtado vs. California, supra, at page 529. The case of Hopt vs. Utah (1884), 110 U. S. 574, is not an authority for the proposition that the Fourteenth Amendment requires the presence of the defendant in court upon the reception of the verdict. In this case the passive acquiesence of the defendant to the challenging of jurors in his absence was held not to constitute a waiver of a provision in the criminal code of Utah requiring that the defendant 'be personally present at the trial.' Furthermore, at this time Utah was a territory, and the proceeding took place in a court established by Congress under Article 4, Section 3 of the United States Constitution, and not in a State court within the meaning of the Fourteenth Amendment. (Cf. 1 Willoughby on the Constitution, Section 161.)"

And also the criticism of the same case by the editor of the Columbia Law Review:

> "In Hopt v. Utah, the Supreme Court declared that the right to be present at every part of the proceedings in a felony case could not be waived, but this was a decision in regard to the practice in federal courts, and not in reference to the powers of the State under the Fourteenth Amendment. The court has held that the Amendment does not require of the States an indictment by grand jury in a prosecution for a felony, nor does it prevent trial by a jury of eight, nor does it require that a witness be exempt from compulsory self-incrimination, although in a federal proceeding any of these objections might be successfully urged under the constitution. The more recent decisions of the Supreme Court show clearly that in matters of criminal procedure the question of due process is largely left to the courts in the individual States."

"Barton v. State (1881) 67 Ga. 653; Commonwealth v. McCarthy (1895) 163 Mass. 458, in which the court, alluding to the defendant's absence at the time of the reception of the verdict, says at page 460: 'There is no very important reason for requiring the defendant's presence then.'

"Utah at the time was a territory, and the provisions of the Constitution applicable to the federal government in reference to trial by jury and due process, were construed, see Thompson v. Utah (1898) 170 U. S. 343, 349, and not the Fourteenth Amendment which applies only to a State. Moreover, the Supreme Court rendered its decision not in the light of the constitution, but as an appellate court in the enforcement of a provision in the Criminal Code of Utah, which required that the 'defendant must be personally present at the trial.' It is interesting to note that Mr. Justice Harlan, who delivered the opinion in the case, was overruled in most of the subsequent leading cases in regard to his view of the relation of the Fourteenth Amendment to the States."

11. The presence of a defendant in Court at the reception of the verdict does not go to the jurisdiction of the Court.

The courts of most of the States are in harmony holding that the rendition of the verdict in the absence of the defendant—certainly when he waived his presence—in misdemeanors, does not vitiate the trial, and it has likewise been held with practical unanimity that in felonies other than capital the defendant may waive his presence at the moment the verdict is received and that this cannot affect the validity of the conviction.

Warren vs. State, 19 Ark. 214; 68 American Decisions, 214, and the extensive annotations thereto.

State vs. Way, 76 Kan. 928; 14 L. R. A. (N. S.), 603, and the full annotations accompanying the report of the case in the volume last named.

Fite vs. State, 7 Ohio, par 1, p. 180; 28 American Decisions, 626, and the note accompanying the case last cited.

Goar vs. State, 52 Ark. 285; 5 L. R. A. 832, and note accompanying the same.

See also Century Digest, Vol. 14, paragraphs 1469 *et seq.*, where a number of cases are cited supporting the proposition.

The foregoing is not intended to be exhaustive of the cases as to waiver of presence at the time of the rendition of the verdict, but they are perhaps sufficient to show that it is well recognized in nearly all jurisdictions that as to felonies less than capital there are numerous instances where the presence of the defendant may be waived at the moment the verdict is received, and that such absence does not affect the trial. In a number of these cases the point was raised not by habeas corpus but by appeal or writ of error.

It is to be further noted that in many of the cases next above referred to the waiver was made by the prisoner's counsel and the court holding that such waiver was effective. Appellant's position in the present proceeding is this: He was not personally present at the moment the verdict was received, his absence being the result of an express waiver by his counsel. He contends that to receive the verdict under these circumstances was not only erroneous, but that it robbed the court of jurisdiction to sentence him. He thus treats the necessity of the prisoner's presence at the moment of the rendition of the verdict, not as an incident of the trial merely, but as the one thing, the absence of which robs the court of jurisdiction to hold him under the judgment rendered. If, as so clearly appears from the authorities cited above, the prisoner's actual presence at the moment may be legally waived by his counsel in some instances, it is difficult for us to see how the same waiver

regarded in lesser felonies as permissible, absolutely robs the court of jurisdiction when the felony is of a higher grade, to-wit.: capital felony. If the actual presence of the prisoner at the moment the jury returns the verdict in lesser felonies is a mere incident of the trial, what is it in the higher grade of the crime that transforms what in one case is permissible, and at most an irregularity, into such an illegal act as to rob the court of jurisdiction, and to be a denial to the prisoner of due process of law simply because as in the instant case the felony is of a higher grade? This was an indictment for murder. It is permissible in Georgia for a jury to find a defendant charged with murder guilty of a lesser offense, to-wit.: voluntary manslaughter, involuntary manslaughter, or even a misdemeanor. Now, under the almost unbroken line of authorities, if the verdict had been for a misdemeanor, or for a felony less than capital, the absence of the accused at the moment the jury returned the verdict (his presence being waived by his counsel) would not vitiate it; but until the verdict was actually published no one knew whether it would be for a misdemeanor, small felony or capital felony; and yet learned counsel for appellant insists that if the undelivered verdict of the jury should be one of guilty of capital felony that such absence would not only be erroneous, but would render the trial nugatory—would rob the court of jurisdiction, and would be a denial to the prisoner of due process of law. In other words, the identical waiver would in the one case be good, in the other fatal, and this distinction would be merely on account of a difference in the grade of the felony. No such alternative result, we respectfully submit, would ever attach to a substantial right, and this we confidently assert shows conclusively that such a right is a mere incident of the trial, and the absence of the prisoner a mere irregularity at most, and does not go to the want of jurisdiction.

12. Waivers such as were made in this case by the prisoner's counsel are binding on the prisoner.

This question should turn on the authority of a prisoner's counsel to make waiver for him, and ratification thereof by the prisoner. As to what may be waived, and what may not, and as to whether the court shall proceed on a waiver expressly made by the counsel for the accused, and how far the accused may be bound by the waiver, we insist, are merely matters of procedure which must be determined by the court trying the accused. It is settled in this State that the voluntary absence of the accused at the time the verdict is received will not vitiate the verdict.

> Cawthorn vs. State, 119 Ga. 395, 412.
> Roberts vs. State, 83 Ga. 167.
> Barton vs. State, 67 Ga. 653.

The last named case was cited with approval by the Supreme Court of the United States in Diaz vs. State, 223 U. S. 442. In a well-known Georgia case Mr. Justice Lumpkin uses this language:

> "Assuming his right to be present while the Solicitor-General was arguing the case to the jury, and the accused being then present, though the presiding judge was not actually aware of this fact, the real question is: Did the failure of counsel for the accused to call attention to the court to the fact that the accused was not present constitute a binding waiver by or for him of his undoubted right to be present.
>
> "Tiller vs. State, 96 Ga. 430, 432."

Here the intimation is that counsel for the accused did have the right to make an *express* waiver of his presence.

So the question really turns on the authority of the attorney to bind his client. If, 'he represents his client' if,

'he is the substitute of his client'; if, 'whatever the client may do in the conduct of his cause, therefore, his counsel may do,' then the waiver binds him.

Mitchum vs. State, 11 Ga. 630.

Note the following strong language by Chief Justice Lumpkin, of Georgia:

> " 'Was it best in the court to allow the prisoner to be tried by a jury taken from the grand jury list, by consent of both *counsel* for the State and the prisoner? (Italics not by the court.) We think not. And we lay down the broad proposition that a prisoner may waive even a trial itself and be capitally punished upon his own confession of guilt; he may waive any minor right or privilege. The greater including the less.'
>
> "Sarah vs. State, 28 Ga. 576, 581.

This, be it remembered, was a capital case. The waiver dealt with by the judge was a waiver by counsel too.

Messrs. Rosser and Arnold made an express agreement with the trial judge waiving the presence of their client, and this was a waiver by the client himself under the law.

There are many statutory and constitutional rights which Georgia affords to a person accused of crime, and we recall none, and within the limited time at my disposal to run down this question, I have been able to find none, which our courts said might not be waived by counsel for the prisoner. Every person accused of crime is entitled upon demand to a list of the witnesses upon whose testimony the grand jury found the bill; but this is almost invariably waived by defendant's counsel, even in capital cases. And the same is true with reference to copy of indictment. And this is also true in arraignment.

' The prisoner in each instance has the right to make a

statement in his own behalf, and his counsel frequently waives this right, even in capital cases.

It is his right to have the jury polled, but his counsel waives this more frequently than he insists upon it.

Because of these waivers the accused is not denied due process of law, nor is his trial void.

> "Penal Code, Sec. 5.
> "Bishop Criminal Law, Sec. 995.
> "Wiggins vs. Tyson, 112 Ga. 744, 750.
> " 'It has also been held that by virtue of a general retainer, an attorney may waive mere informalities and technicalities, and verifications, formal notice of proceedings in a case, or objections to evidence or the manner of taking it.'
> "4 Cyc., 939, 940.

13. Frank cannot repudiate the acts of his counsel.

There is another view of this entire matter we wish to submit to the court. Having acted on the suggestion that he did not wish to be personally present, and obtaining the benefit of the agreement and waiver, will Frank not be permitted to repudiate the action of his counsel, the same counsel who subsequently filed a motion for a new trial in his behalf and represented him in that motion before the trial judge, as well as in this court? Frank did not repudiate his counsel. Can he while retaining them repudiate *the act* of his counsel?

We quote from the opinion of Mr. Justice Lewis in the case of Williams vs. State, 107 Ga. 721, 725, 726.

> " 'It was held that the agreement in open court that the accusation might be changed from simple larceny to larceny from the house embraced the right of the solicitor to make a good and perfect accusation for the latter offense; and having been made

when the solicitor could have withdrawn the accusation and presented another, it was right to allow it to be consummated by the making of the amendment which was objected to. It is true that was an accusation and not an indictment, but the principle is the same, for the statute prescribes certain means by which such accusations shall be framed; for instance, that they shall be found upon the affidavit of a prosecutor; and if an agreement in open court will dispense with such formalities in the case of an accusation, we do not see why the same rule will not apply to an indictment. We therefore think that even if the alleged defect in this indictment had not been observed until after trial, it was then too late for the defendant to make the objection. But in this case counsel for defendant not only knew of the defect before pleading to the merits, but actually waived it for the accommodation of the defendant himself, consented for the solicitor to fill in the names of the grand jurors, which was accordingly done, and went to trial on his plea of not guilty. When he pleaded, therefore, the record was perfect on its face. As this court has said in the case of Lumpkin vs. State, 87 Ga. 517, 'It is not sound practice for counsel to remain silent, take the chances of acquittal for his client, and then, after conviction, urge the juror's incompetency as a ground for setting the verdict aside.' Much less would it be sound practice to allow counsel to waive a defect for his own convenience, take the chances of an acquittal, and then, after conviction, urge such defect as a reason for setting aside the verdict. Hodge vs. State, 39 Ga. 719. The principle cannot be expressed in stronger language than the following from the decision in Sarah vs. State, 28 Ga. 576 (2): 'As the prisoner may waive even a trial itself, and be capitally punished upon his own confession of guilt, he may waive every other right or privilege. The greater includes the less, or the whole parts.'

Who was in best position to decide this question, Frank or his counsel? Who could best protect him, his counsel or himself? Was he conducting his trial in person or by trained, efficient and able counsel who had his best interests at heart? Was it not within their province and their right and their duty to make this waiver, and having made it, is it not binding on Frank?

This we again say is the duty of the client and comes within his powers.

> " 'It is not foreign to the subject to say that it is the duty of counsel to guard, by the most scrupulous propriety of demeanor, in the conduct of a cause, the dignity and honor of the profession. Connected as it is, most intimately, with the administration of justice, it should be protected most vigilantly from falling into popular disrepute. It ought, as I verily believe it does, to command the respect of the wise, and the reverence of the good. Power and place—hereditary wealth—stupidity in high social position, and even genius, pandering to a popular taste for caricature; jealous of the power which it wields upon governments, have laboured to degrade it. Still in this country and in England, if no where else, the bar is the ladder upon which men mount to distinction; the lawyer is the champion of popular rights; the class to which he belongs is more influential than any other; and counsel, yes, feed counsel, is indispensable to a fair and full administration of justice. When learning and character, and practiced skill, and eloquence, and enthusiasm, chastened by discretion, are enlisted in behalf of the litigant, he may rest assured that he holds in his counsel the very best guarantee against all forms of wrong and oppression in the administration of the law. It is true, that he is paid for his services—and what of that? Are not princes and premiers, presidents and priests also paid? One thing never yet was bought with money, and that is the soul-engrossing identification of counsel with his

client. It is gratuitous bestowal of his sympathy, drawing forth the masterly powers of his genius and the rich treasures of his learning, that makes the great lawyer, the honored and influential citizen. The approval of conscience and the respect of good men are his reward; far richer than the stipulated fee of these days, or the honorarium of the Roman advocate. If I thus magnify the office of the counsel, it is for the purpose of saying that its very importance makes indispensable the exclusion of the habit which we now condemn. But I proceed, claiming the indulgence on account of these general remarks, of the critical professional reader, to test the rule we lay down by strictly legal considerations. That rule is, that it is contrary to law for counsel to comment upon facts not proven. He represents his client—he is substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel may do.'

"Mitchum vs. State, 11 Ga. 615, 629, 630."

14. The Supreme Court of the United States will not grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error.

As bearing directly on the question of whether this court will grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error, we rely upon the case of Duncan vs. Missouri, from which we quoted a moment ago, the proposition contended for being succinctly stated in the syllabus in 152 U. S., page 378, as follows:

"To give this court jurisdiction over a judgment of the highest court of a State, the title, right, privi-

lege or immunity relied on must be specially set up and claimed at the proper time and in the proper way, and the decision must be against it."

We also rely upon the proposition stated in the decision in Rogers vs. Peck, 199 U. S., page 425, to-wit.:

> "It is only where fundamental rights, specially secured by the federal constitution, are invaded, that the federal courts will interfere with a State in the administration of its law for the prosecution of crime, and it will not be presumed that if the freedom of a person properly convicted of murder and sentenced to death is improperly restricted that the State authorities will not afford the necessary relief. . . . Due process of law, guaranteed by the Fourteenth Amendment, does not require a State to adopt a particular form of procedure, so long as the accused has had sufficient notice and adequate opportunity to defend himself in the prosecution, and the State may determine, free from federal interference or control, in what courts crime may be prosecuted and by what courts the prosecution may be reviewed."

We invoke the court's consideration of the case of Spencer, 228 U. S. 662, in which the Supreme Court of the United States ruled:

> "Federal courts will not grant relief by habeas corpus on constitutional grounds to persons imprisoned under a conviction in a State court, where the petitioners failed to raise such questions either when they were brought up for sentence or on appeal to an intermediate appellate court, or by their unsuccessful petition to the highest tribunal of the State to allow an appeal to that court."

15. The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held Frank could not do directly.

We submit that this application for habeas corpus is but an effort to do by indirection what this court has already held Frank could not do directly, i. e., have the Supreme Court of the United States to review the action of the Supreme Court of Georgia in declining to give Frank his liberty for the reasons stated in his application.

As early as 1822 the Supreme Court of the United States in the case of Ex parte Kearney, speaking through Mr. Justice Story (the case being 20 U. S. 38, 42), says:

> "If every party had the right to bring before this court every case in which judgment had passed against him for a crime, or misdemeanor or felony, the courts of justice might be materially delayed and obstructed and in some cases totally frustrated."

If then this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly.

In Ex parte Bigelow, the Supreme Court of the United States, in 113 U. S., page 328, Mr. Justice Miller, delivering the opinion of the court, said:

> "It may be confessed that it is not always easy to determine what matters go to the jurisdiction of the courts, so as to make its action when erroneous a nullity, but the general rule is that when the court has jurisdiction by law of the offense and of the party who is so charged, its judgments are not nullities. There are exceptions to this rule but when they are relied on as foundations for relief in another proceeding they should be clearly found to exist. . . . We are of the opinion that what was done by that court was within its jurisdiction, that the question

thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and decision was the exercise of jurisdiction."

As early as 1830, in 3d Peters, 28 U. S. 193, the case of Ex parte Tobias Watkins is an authority for the proposition that a decision by the court of a question as to its jurisdiction is itself exercise of its jurisdiction, and should the court in the first instance reach an incorrect conclusion it cannot be treated as void as having been rendered by a court having no jurisdiction. The proposition finds full support in the syllabus on page 193, and again in the argument of Mr. Chief Justice Marshall on page 202.

16. The Supreme Court of Georgia had jurisdiction to determine whether Frank's counsel could waive his presence, and even if this Court should think that ruling error, habeas corpus cannot correct it.

In the case of Ex parte William Belt, the Supreme Court of the United States held:

> "Where the court below had jurisdiction to determine the validity of an act which authorized the waiver of a jury, and to decide whether the record of a conviction before a judge without a jury where the prisoner waived trial by jury according to statute was legitimate proof of a first offense, this court cannot review the action of that court in this particular on habeas corpus."

In the opinion Mr. Chief Justice Fuller says:

> "In Hallinger vs. Davis, 146 U. S. 314, 318, it was said by this court: 'Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by State

courts, upholding the validity of such proceeding. Daily vs. State, 4 Ohio St. 57; Dillingham vs. State, 5 Ohio St. 280; People vs. Noll, 20 Cal. 164; State vs. Worden, 46 Conn. 349, 33 Am. Rep. 27; State vs. Albee, 61 N. H. 423, 428, 60 Am. Rep. 325.' And see Edwards vs. State, 45 N. J. L. 419, 423; Ward vs. People, 30 Mich. 116; Connelly vs. State, 60 Ala. 89, 31 Am. Rep. 34; Murphy vs. State, 97 Ind. 579; State vs. Sackett, 39 Minn. 69; Lavery vs. State, 101 Pa. 560; League vs. State, 36 Md. 257, cited by the Court of Appeals."

Ex parte William Belt, 159 U. S. 97.

The case from which we last quote was habeas corpus. Petitioner was imprisoned under a sentence of the Supreme Court of the District of Columbia. The court decided that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and hence that the judgment of conviction was not void for lack of jurisdiction in the court.

In the case presented here now by appellant we submit that the courts of Georgia had jurisdiction and authority to determine the effect of the previous decisions of the Supreme Court of which the Georgia courts base their rulings on the several matters complained of by Frank in this application. The Supreme Court based their ruling on decisions which under the Code of Georgia have the effect of statutes.

Sec. 6207 (Civil Code of Georgia). "A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument, the court in its

decisions shall state distinctly whether it affirms, reverses, or changes such decision."

17. The action of the Court in permitting Frank's counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly habeas corpus cannot avail to discharge the prisoner.

In a Minnesota case it was held that:

> "Where upon the trial of an indictment the trial court had jurisdiction of the person of the defendant no inquiry can be had under a habeas corpus as to whether the relator was in fact present or absent when the jury was discharged from the further consideration of the indictment or whether the decision of the court was correct or incorrect."
>
> 24 Minnesota 87.

Judge Cornell, delivering the opinion of the court, says on page 92:

> "An error committed in the exercise of a conceded power or jurisdiction is only voidable in its effect, whereas, an act done without any authority or jurisdiction, or in excess of it, is wholly illegal and void. In illustrating this difference Mr. Hurd says (page 133) that to sentence a man to imprisonment in his absence, when the sentence was occasioned by order of the court pronouncing the sentence, would be an irregularity, merely, reviewable alone on error, while sentencing him to imprisonment for a crime punishable by a pecuniary fine only would be illegal, and hence wholly void."

And on the latter part of page 92 and on page 93:

> "So in the Tweed case, where it appeared from the record that the judgment was one which, upon the indictment, the court pronouncing it had author-

ity to render under any circumstances. The defects complained of in the case before us are of an entirely different character. No final judgment upon the indictment herein has yet been reached, and, therefore, the district court has never yet been dispossessed of its jurisdiction over it, nor of the person of the accused. In the lawful exercise of this jurisdiction it has the undoubted authority, under certain circumstances, and for certain specified causes (Gen. St. c. 116, Sections 16, 17) to discharge the jury prior to a verdict, and to cause a retrial of the indictment before another jury. It necessarily had the right of determining upon the existence of these circumstances and causes, and, whether it erred or not, its decision thereon was lawful and valid, until reversed on error. This conclusion is fully supported by the case of Wright vs. The State, 5 Ind. 290, which is directly in point on the question under consideration, and we are confident no authority can be found in any way countenancing a contrary doctrine. In that case the jury, having failed to agree upon a verdict prior to the time designated for closing the term, was brought into court and discharged against the defendant's objection. This was held an improper discharge of the jury, and that, under the laws of the State, it precluded a retrial of the indictment before another jury, yet the court refused to discharge the prisoner on habeas corpus, saying that he must apply for relief to the trial court wherein the indictment was pending."

In Hurd on Habeas Corpus, 2d Edition, pages 327 and 328, the author distinguishes between irregularity and illegality, and states the proposition relating to habeas corpus in the following words:

"An *irregularity* is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting some-

thing that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. . . . It is the technical term for every defect in practical proceedings or the mode of conducting an action, or defense as distinguishable from defects in pleadings. *Illegality* is properly, predicable on radical defecs only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes a complete defect in proceedings.

"It would be *irregular* to sentence a man to imprisonment in his absence, where the absence was occasioned by order of the court pronouncing the sentence. It would be *illegal* to sentence him to prison for a crime which was punishable by a pecuniary fine only. Wise rules of procedure established for the regulation of other judicial proceedings are not to be disregarded in that of habeas corpus, when they are applicable. One of these rules is that when a record or process is only *collaterally* brought into question, it cannot be invalidated for error or irregularity.

"It matters not how flagrant the error is. As where a defendant on trial for vagrancy was not allowed to cross examine the prosecuting witnesses, nor to produce witnesses in her own behalf, the court upon habeas corpus could not release the prisoner."

Church on Habeas Corpus. in the 2d Edition, paragraph 255, says:

"Sec. 255. *Discharge of Jury in Absence of Defendant.*—In a case on proceedings by the writ of habeas corpus, where the existence of the facts stated in the return is not denied, where the validity of the indictment is unquestioned, and where the fact is not disputed that the primary court regularly and lawfully acquired jurisdiction over the person

of the accused, who was properly arraigned and put upon trial under the indictment, no inquiry can be had as to whether the relator was in fact present or absent when the jury was discharged from further consideration of the indictment, or whether the decision of the court in discharging them was correct or incorrect. And conceding that the court erred in discharging the jury, and that the alleged error was cognizable in a court of review, it could not be reviewed without the record in the cause was properly before the court of review in such a way as to give it a revisory power under its appellate jurisdiction. But such an error is a mere irregularity, and should not be reviewed under this writ. It does not affect the question of jurisdiction, and where a court has jurisdiction, it is within its power and authority, and is clearly its duty, to entertain, hear, and determine every question that may possibly or legitimately arise during the progress of the trial to final judgment of conviction or acquittal. The fact, therefore, if it be one, that the court has improperly discharged the jury in the enforced absence of the prisoner, does not dispossess the court of its jurisdiction over the cause. If so, any further step or proceeding in the action is wholly nugatory, and the only judgment that can be rendered is one of dismissal for want of jurisdiction, instead of a judgment upon the merits, which alone can furnish any protection to the defendant against another prosecution for the same offense.

"In 1877 Mr. Justice Cornell, of the Supreme Court of Michigan, in a case involving the above principles, quoted the language of the court in People vs. Liscomb, 'whether the determinations of the court upon any or all of the questions were right or wrong did not affect its jurisdiction. In other words, the court had jurisdiction to make wrong as well as right decisions in all the stages of the prosecution, and whether those made were right or wrong

cannot be raised on habeas corpus;' and said: 'No final judgment upon the indictment herein has yet been reached, and therefore the district court has never yet been dispossessed of its jurisdiction over it, nor of the person of the accused. In the lawful exercise of this jurisdiction, it has the undoubted authority, under certain circumstances and for certain specified causes (Gen. Stats., c. 116, secs. 16, 17), to discharge the jury prior to a verdict, and to cause a retrial of the indictment before another jury. It necessarily had the right of determining upon the existence of these circumstances and causes, and whether it erred or not, its decision thereon was lawful and valid, until reversed on error. .This conclusion is fully supported by the case of Wright vs. The State, 5 Ind. 290, which is directly in point on the question under consideration, and we are confident no authority can be found in any way countenancing a contrary doctrine. In that case the jury having failed to agree upon a verdict prior to the time designated for closing the term, was brought into court and discharged, against the defendant's objection. This was held an improper discharge of the jury, and that, under the laws of that state, it precluded a retrial of the indictment before another jury, yet the court refused to discharge the prisoner on habeas corpus, saying that he must apply for relief to the trial court wherein the indictment was pending.

" 'Fully agreeing with the doctrine of that case upon this point, it follows that no inquiry can be had in this proceeding whether the relator was in fact present or absent when the jury was discharged from the further consideration of the indictment, nor whether the decision of the trial court in discharging them was correct or incorrect, and the prisoner must be remanded.' "

In view of the foregoing authorities we respectfully submit that the Supreme Court of the United States should in this case determine that on a trial for murder in a state court the due process of law clause of the Fourteenth Amendment does not guarantee the right to be present, to the defendant, when the verdict was returned;

And that this court ought to decide that he cannot in any event now be discharged in view of the final judgment refusing a new trial in the case where the defendant did not make the fact of his absence, when the verdict was returned, a ground of the motion nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the Federal constitution.

The above ought to follow more readily, especially since this court has already refused to grant a writ of error in a case where the alleged jurisdictional question was presented in a motion filed at a time not authorized by the practice of the state where the trial took place.

And certainly habeas corpus is not an available remedy under the facts disclosed.

All of which is respectfully submitted.

WARREN GRICE,
HUGH M. DORSEY,
Counsel for Appellee.

FRANK *v.* MANGUM, SHERIFF OF FULTON COUNTY, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 775. Argued February 25, 26, 1915.—Decided April 12, 1915.

Petitioner was formally indicted for murder, placed on trial before a court of competent jurisdiction with a jury lawfully constituted, had a public trial deliberately conducted and with counsel for defense, was found guilty and sentenced pursuant to law of the State; subsequently he twice moved the trial court to grant new trial, and once to set verdict aside as a nullity, and was heard three times on appeal by the court of last resort, and in all instances the trial court was affirmed. Petitioner alleged that a hostile public sentiment improperly influenced the trial court and jury against him and in the court-room took the form of mob domination; that his lawful rights were interfered with because he was not permitted to be present when the verdict was rendered. The state courts however held, on evidence presumably justifying such a finding but not produced in the *habeas corpus* proceeding, that the allegations as to mob violence and influence were not sustained and that the objection as to absence on rendering the verdict had been waived by failure to raise it in due season when fully informed as to the facts. Petitioner then applied to the District Court of the United States for release on *habeas corpus* on the ground that the conditions alleged to have existed in the court-room amounted to mob domination and de-

prived the court of jurisdiction to receive a verdict and pronounce sentence against him, that his involuntary absence from the court-room was a deprivation of an essential part of the right of trial by jury, and amounted to a denial of due process of law and that the decision of the state court overruling his objections to his enforced absence from court on rendition of verdict was so far inconsistent with previous decisions of the same court as to be equivalent in effect to an *ex post facto* law. His petition was denied and an appeal allowed by a justice of this court. *Held* by this court that:

The question of deprivation of liberty without due process of law involves not the jurisdiction of any particular court, but the power and authority of the State itself, and where there is no claim that the offense is based on an unconstitutional statute, the question of whether the petitioner in *habeas corpus* has been deprived of his liberty in violation of constitutional rights cannot be determined, with fairness to the State, until the conclusion of the course of justice in its own courts, and the United States courts must consider not merely the proceedings of the trial court, but also those in the appellate court of the State.

Due process of law guaranteed by the Fourteenth Amendment has regard to substance of right and not to matters of form and procedure; and in determining whether one convicted of crime has been denied due process, the entire course of proceedings, and not merely a single step, must be considered.

Although petitioner's allegation that mob domination existed in the trial court might, standing alone and if taken as true, show a condition inconsistent with due process of law, if the record in the *habeas corpus* proceedings in the Federal court also shows that the same allegations had been considered by the state court and upon evidence there taken but not disclosed in the Federal court, had been found to be groundless, that finding cannot be regarded as a nullity but must be taken as setting forth the truth until reasonable ground is shown for a contrary conclusion.

The due process of law clause of the Fourteenth Amendment does not preclude a State from adopting and enforcing a rule of procedure that an objection to absence of the prisoner from the court-room on rendition of verdict by the jury cannot be taken on motion to set aside the verdict as a nullity after a motion for new trial had been made on other grounds, not including this one, and denied. Such a regulation of practice is not unreasonable.

The due process of law clause of the Fourteenth Amendment does not impose upon the State any particular form or mode of

procedure so long as essential rights of notice and hearing or opportunity to be heard before a competent tribunal are not interfered with; and it is within the power of the State to establish a rule of practice that a defendant may waive his right to be present on rendition of verdict.

The right of the State to abolish jury trial altogether without violation of the Fourteenth Amendment includes the right to limit the effect to be given to an error respecting an incident of such trial—such as the presence of defendant when the jury renders its verdict.

The prohibition in the Federal Constitution against a State passing an *ex post facto* law is directed against legislative action only, and does not reach erroneous or inconsistent decisions of the courts of the State.

The petitioner in this case was not denied due process of law in the conduct of his trial by the courts of first instance or appellate, nor was the decision of the appellate court, by reason of inconsistency with prior decisions, equivalent to an *ex post facto* law.

LEO M. FRANK, the present appellant, being a prisoner in the custody of the Sheriff in the jail of Fulton County, Georgia, presented to the District Court of the United States for the Northern District of Georgia his petition for a writ of *habeas corpus* under Rev. Stat., § 753, upon the ground that he was in custody in violation of the Constitution of the United States, especially that clause of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law. The District Court, upon consideration of the petition and accompanying exhibits, deeming that upon his own showing petitioner was not entitled to the relief sought, refused to award the writ. Whether this refusal was erroneous is the matter to be determined upon the present appeal.

From the petition and exhibits it appears that in May, 1913, Frank was indicted by the grand jury of Fulton County for the murder of one Mary Phagan; he was arraigned before the Superior Court of that county, and,

on August 25, 1913, after a trial lasting four weeks, in which he had the assistance of several attorneys, the jury returned a verdict of guilty. On the following day, the court rendered judgment sentencing him to death and remanding him, meanwhile, to the custody of the sheriff and jailer, the present appellee. On the same day, the prisoner's counsel filed a written motion for a new trial, which was amended about two months thereafter so as to include 103 different grounds particularly specified. Among these were several raising the contention that defendant did not have a fair and impartial trial, because of alleged disorder in and about the court-room including manifestations of public sentiment hostile to the defendant sufficient to influence the jury. In support of one of these, and to show the state of sentiment as manifested, the motion stated: "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered." But the absence of defendant at the reception of the verdict, although thus mentioned, was not specified or relied upon as a ground for a new trial. Numerous affidavits were submitted by defendant in support of the motion, including 18 that related to the allegations of disorder; and rebutting affidavits were submitted by the State. The trial court, having heard argument, denied the motion on October 31. The cause was then taken on writ of error to the Supreme Court of Georgia, where the review included not only alleged errors in admission and exclusion of evidence, and instructions to the jury, but also a consideration of the allegations of disorder in and about the court-room and the supporting and rebutting proofs. On February 17, 1914, the judgment of conviction was affirmed. (141 Georgia, 243.)

Concerning the question of disorder, the findings and conclusions of the court were, in substance (141 Georgia, 280): That the trial court, from the evidence submitted, was warranted in finding that only two of the alleged incidents occurred within the hearing or knowledge of the jury. 1. Laughter by spectators while the defense was examining one of its witnesses; there being nothing to indicate what provoked it, other than a witty answer by the witness or some other innocuous matter. The trial court requested the sheriff to maintain order, and admonished those present that if there was further disorder nobody would be permitted in the court-room on the following day. The Supreme Court held that, in the absence of anything showing a detrimental effect, there was in this occurrence no sufficient ground for a new trial. 2. Spectators applauded the result of a colloquy between the solicitor general and counsel for the accused. The latter complained of this conduct, and requested action by the court. The Supreme Court said: "The [trial] court directed the sheriff to find out who was making the noise, and, presumably from what otherwise appears in the record, the action by the court was deemed satisfactory at the time, and the orderly progress of the case was resumed without any further action being requested. The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment, unless a ruling upon such conduct is invoked from the judge at the time it occurs. [Citing cases]. . . The applause by the spectators, under the circumstances as described in the record, is but an irregularity not calculated to be substantially harmful to the defendant; and even if the irregularity should be regarded as of more moment than we give it, we think the action of the court, as a manifestation of the judicial disapproval, was a sufficient cure for any possible harmful effect of the irregularity, and deemed so sufficient by the counsel who,

at the time, made no request for further action by the court."

As to disorder during the polling of the jury, the court said (141 Georgia, p. 281): "Just before the jury was ushered into the court's presence for the purpose of rendering their verdict, the court had the room cleared of spectators. The verdict of the jury was received and published in the usual manner. A request was made to poll the jury, and just after the polling had begun loud cheering from the crowd in the streets adjacent to the court-house was heard. This cheering continued during the polling of the jury. The plaintiff in error insists that the cheering on the outside of the court-room, which was loud, and which was heard by the jury, could not have been interpreted otherwise than as expressive of gratification at the verdict which had been rendered, and of which the crowd on the outside had in some way been informed, and was so coercive in character as to affect the fairness of the poll of the jury which was taken. . . . [p. 282]. In order that the occurrence complained of shall have the effect of absolutely nullifying the poll of the jury taken before they dispersed, it must appear that its operation upon the minds of the jury, or some of them, was of such a controlling character that they were prevented, or likely to have been prevented, from giving a truthful answer to the questions of the court. We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result. Under such circumstances we do not think that the occurrence complained of amounts to more than an irregularity, which was not prejudicial to the accused. There is a wide difference between an irregularity produced by the juror himself, or by a party, and the injection into a trial of an occurrence produced by some one having no connection therewith."

After this decision by the Supreme Court, an extraor-

dinary motion for a new trial was made under Georgia Code 1910, §§ 6089, 6092, upon the ground of newly discovered evidence; and this having been refused, the case was again brought before the Supreme Court, and the action of the trial court affirmed on October 14, 1914 (142 Georgia, 617; *S. C.*, 83 S. E. Rep. 233).

On April 16, 1914, more than six months after his conviction, Frank for the first time raised the contention that his absence from the court-room when the verdict was rendered was involuntary, and that this vitiated the result. On that day, he filed in the Superior Court of Fulton County a motion to set aside the verdict as a nullity [1] on this ground (among others); stating that he did not waive the right to be present nor authorize anybody to waive it for him; that on the day the verdict was rendered, and shortly before the presiding judge began his charge to the jury, the judge privately conversed with two of the prisoner's counsel, referred to the probable danger of violence to the prisoner if he were present when the verdict was rendered, in case it should be one of acquittal, or if the jury should disagree, and requested counsel to agree that the prisoner need not be present when the verdict was rendered and the jury polled; that in the same conversation the judge expressed the view that even counsel might be in danger of violence should they be present at the reception of the verdict, and under these circumstances they agreed that neither they nor the prisoner should be present, but the prisoner knew nothing of the conversation

[1] The constitution of Georgia provides (Art. 1, § 1, Par. 8; Code 1911, § 6364): "No person shall be put in jeopardy of life, or liberty, more than once for the same offence, *save on his or her motion for a new trial* after conviction, or in case of mistrial." In some cases a distinction has been taken between a motion for a new trial, and a motion to set aside the verdict as a nullity. It seems that if a motion of the latter kind is granted upon grounds such as were here urged, defendant, if again put upon trial, can plead former jeopardy. *Nolan* v. *State*, 55 Georgia, 521; *Bagwell* v. *State*, 129 Georgia, 170.

or agreement until after the verdict and sentence; and that the reception of the verdict during the involuntary absence of defendant and his counsel was a violation of that provision of the constitution of the State of Georgia guaranteeing the right of trial by jury, and was also contrary to the "due process of law" clause of the Fourteenth Amendment. The motion was also based upon allegations of disorder in the court-room and in the adjacent street, substantially the same as those previously submitted in the first motion for a new trial. To this motion to set aside the verdict the State interposed a demurrer, which, upon hearing, was sustained by the Superior Court; and upon exception taken and error assigned by Frank, this judgment came under review before the Supreme Court, and, on November 14, 1914, was affirmed (83 S. E. Rep. 645; 142 Ga. 741).

The grounds of the decision were, briefly: That by the law of Georgia it is the right of a defendant on trial upon a criminal indictment to be present at every stage of the trial, but he may waive his presence at the reception of the verdict (citing *Cawthon* v. *State*, 119 Georgia, 395, 412); that a defendant has the right by motion for a new trial to review an adverse verdict and judgment for illegality or irregularity amounting to harmful error in the trial, but where such a motion is made it must include all proper grounds which are at the time known to the defendant or his counsel, or by reasonable diligence could have been discovered (citing *Leathers* v. *Leathers*, 138 Georgia, 740); that objections to the reception of a verdict during the enforced absence of defendant without his consent, or to the taking by the trial court of other steps in his absence and without his consent, can be made in a motion for a new trial (citing *Wade* v. *State*, 12 Georgia, 25; *Martin* v. *State*, 51 Georgia, 567; *Bonner* v. *State*, 67 Georgia, 510; *Wilson* v. *State*, 87 Georgia, 583; *Tiller* v. *State*, 96 Georgia, 430; and *Hopson* v. *State*, 116 Georgia,

90), and in such case the verdict rendered against the defendant will not be treated as a nullity, but will be set aside and a new trial granted; and since Frank and his counsel, when the motion for a new trial was made, were fully aware of the facts respecting his absence when the verdict of guilty was rendered against him, the failure to include this ground in that motion precluded him, after denial of the motion and affirmance of the judgment by the Supreme Court, from seeking upon that ground to set aside the verdict as a nullity. Respecting the allegations of disorder, the court held that the questions raised were substantially the same that were presented when the case was under review upon the denial of the first motion for a new trial (141 Georgia, 243), at which time they were adjudicated adversely to the contentions of defendant, and the court therefore declined to reconsider them. The result was an affirmance of the judgment of the trial court denying the motion to set aside the verdict.

Shortly after this decision, Frank unsuccessfully applied to the Supreme Court of Georgia for the allowance of a writ of error to review its judgment in this court. Thereafter he applied to several of the justices of this court, and finally to the court itself, for the allowance of such a writ. These applications were severally denied. (See 235 U. S. 694.)

Thereupon his application for a writ of *habeas corpus* was made to the District Court, with the result already mentioned. The petition purports to set forth the criminal proceedings pursuant to which appellant is detained in custody, including the indictment, the trial and conviction, the motions, and the appeals above set forth. It contains a statement in narrative form of the alleged course of the trial, including allegations of disorder and manifestations of hostile sentiment in and about the courtroom, and states that Frank was absent at the time the verdict was rendered without his consent, pursuant to a

suggestion from the trial judge to his counsel to the effect that there was probably danger of violence to Frank and to his counsel if he and they were present and there should be a verdict of acquittal or a disagreement of the jury; and that under these circumstances they consented (but without Frank's authority) that neither he nor they should be present at the rendition of the verdict. From the averments of the petition it appears that the same allegations were made the basis of the first motion for a new trial, and also for the motion of April 16, 1914, to set aside the verdict. Accompanying the petition, as an exhibit, was a copy of Frank's first motion for a new trial and the supporting affidavits. The rebutting affidavits were not included, nor were they in any way submitted to the District Court; therefore, of course, they have not been brought before this court upon the present appeal. The petition refers to the opinion of the Georgia Supreme Court affirming the conviction and the denial of the motion for a new trial (141 Georgia, 243); it also refers to the opinion upon the affirmance of the motion to set aside the verdict as a nullity (83 S. E. Rep. 645), and a copy of this was submitted to the District Court as an exhibit. From these opinions, and from the order of the Superior Court denying the motion for new trial, which is included among the exhibits, it appears that the rebutting affidavits were considered and relied upon by both of the state courts as the basis of their findings upon the questions of fact.

Mr. Louis Marshall, with whom *Mr. Henry C. Peeples* and *Mr. Henry A. Alexander* were on the brief, for appellant:

The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth

Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the court and the nullification of the verdict and judgment. *Hovey* v. *Elliott*, 167 U. S. 409; *Windsor* v. *McVeigh*, 93 U. S. 274; *B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Scott* v. *McNeal*, 154 U. S. 34; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 280-282; *Ex parte Riggins*, 134 Fed. Rep. 404; *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127; *Londoner* v. *Denver*, 210 U. S. 385; *Denver* v. *State Investment Co.*, 49 Colorado, 244; *S. C.*, 112 Pac. Rep. 789; *Ong Chang Wing* v. *United States*, 218 U. S. 280, distinguishing *Hurtado* v. *California*, 110 U. S. 516; *Allen* v. *Georgia*, 166 U. S. 138; *Brown* v. *New Jersey*, 175 U. S. 172; *Maxwell* v. *Dow*, 176 U. S. 581; *Simon* v. *Craft*, 182 U. S. 427; *West* v. *Louisiana*, 194 U. S. 258; *Howard* v. *Kentucky*, 200 U. S. 164; *Twining* v. *New Jersey*, 211 U. S. 78; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Jordan* v. *Massachusetts*, 225 U. S. 167; *Garland* v. *Washington*, 232 U. S. 642.

The right of the accused to be present at every stage of his trial, including the reception of the verdict, is essential to the right to be heard. *Nolan* v. *State*, 55 Georgia, 522; *Prine* v. *Commonwealth*, 18 Pa. St. 103; *Lewis* v. *United States*, 146 U. S. 372; *Rex* v. *Ladsingham*, Sir T. Raym. 193; *Dunn* v. *Commonwealth*, 6 Pa. St. 384; *Temple* v. *Commonwealth*, 14 Bush (Ky.), 769; *Rhodes* v. *State*, 128 Indiana, 189; 2 Moore on Facts, §§ 991–995; Cooley's Const. Lim., 2d ed., § 452; McGehee on Due Process, pp. 164, 165, 168; 1 Bishop's New Cr. Proc., 1913, §§ 265–274; *Nolan* v. *State*, 53 Georgia, 137; *Bonner* v. *State*, 67 Georgia, 510; *Barton* v. *State*, 67 Georgia, 653; *Bagwell* v. *State*, 129 Georgia, 170; *Cawthon* v. *State*, 119 Georgia, 395; *Lyons* v. *State*, 7 Ga. App. 50; *Hopt* v. *Utah*, 110 U. S. 574; *Ball* v. *United States*, 140 U. S. 118; *Schwab* v. *Berggren*, 143 U. S. 442, 448; *Dowdell* v. *United States*, 221 U. S. 321; *Diaz* v. *United States*, 223 U. S. 442, 455, and the decisions of the courts of twenty-eight States.

Not only was the appellant deprived of due process of law, because he was by the action of the court, kept out of the court-room when the verdict was rendered, but the entire proceedings became *coram non judice*, because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the court. *People* v. *Wolf*, 183 N. Y. 472; 5 Cyc. U. S. S. C. Rep. 618, and cases cited; *Massey* v. *State*, 31 Tex. Cr. Rep. 371; *State* v. *Welden*, 91 S. Car. 29; *Sanders* v. *State*, 85 Indiana, 319; *People* v. *Fleming*, 136 Pac. Rep. 291; *Myers* v. *State*, 97 Georgia, 76; *Collier* v. *State*, 115 Georgia, 803; *Ex parte Riggins*, 134 Fed. Rep. 404; *Ellerbee* v. *State*, 75 Mississippi, 522; *Blend* v. *People*, 41 N. Y. 604; *People* v. *Shaw*, 3 Hun, 272, aff'd 63 N. Y. 36; *Hinman* v. *People*, 13 Hun, 266; *Hayes* v. *Georgia*, 58 Georgia, 35; *O'Brien* v. *People*, 17 Colorado, 561; *McClure* v. *State*, 77 Indiana, 287; *Pennoyer* v. *Neff*, 95 U. S. 714; *United States* v. *Shipp*, 203 U. S. 563.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure. *Barton* v. *State*, 67 Georgia, 653; *Robson* v. *State*, 83 Georgia, 171; *Cawthon* v. *State*, 119 Georgia, 395; *Lyons* v. *State*, 7 Ga. App. 50; *Hopt* v. *Utah*, 110 U. S. 579; *Schwab* v. *Berggren*, 143 U. S. 449; *Lewis* v. *United States*, 146 U. S. 373; *Thompson* v. *Utah*, 170 U. S. 343; *Kepner* v. *United States*, 195 U. S. 100, 135; *Cancemi* v. *People*, 18 N. Y. 128; *Ball* v. *United States*, 140 U. S. 118; *Dickinson* v. *United States*, 159 Fed. Rep. 801; *Diaz* v. *United States*, 223 U. S. 456.

It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel. *Thompson* v. *Utah*, 170 U. S. 343.

If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment as a nullity.

Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned can be raised, then, we contend, that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an *ex post facto* law. *Nolan* v. *State*, 53 Georgia, 137; *Lyons* v. *State*, 7 Ga. App. 50; *Rawlins* v. *Mitchell*, 127 Georgia, 24; *Hopt* v. *Utah*, 110 U. S. 579; Laws of Georgia, Acts of 1858, p. 74, Georgia Code, 1882, § 217; Georgia Code, 1910, § 6207; *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544.

It follows from the propositions thus far discussed that appellant's application for a writ of *habeas corpus* is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him the court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making *habeas corpus* the proper remedy to test the validity of his detention thereunder. Rev. Stat., §§ 751–756; *Matter of Hans Nielsen*, 131 U. S. 176; *Ex parte Bain*, 121 U. S. 1; *In re Bonner*, 151 U. S. 242, 256; *Felts* v. *Murphy*, 201 U. S. 123; *Valentina* v. *Mercer*, 201 U. S. 131; *Rogers* v. *Peck*, 199 U. S. 425; *Ex parte Bridges*, 2 Woods, 428; *S. C.*, 4 Fed. Cas. 105, 106; *McClaughry* v. *Deming*, 186 U. S. 49; *Oakley* v. *Aspinwall*, 3 N. Y. 547; *Kaizo* v. *Henry*, 211

U. S. 146; *Harlan* v. *McGourin*, 218 U. S. 442; *Stevens* v. *McClaughry*, 207 Fed. Rep. 18; *Matter of Spencer*, 228 U. S. 652; *Rogers* v. *Alabama*, 192 U. S. 226, 230.

The appellant had, before applying for a writ of *habeas corpus*, exhausted all of his remedies in the state courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this court has pointed out as controlling in like cases. *Ex parte Royall*, 117 U. S. 241; *Ex parte Charles W. Fonda*, 117 U. S. 516; *Wood* v. *Brush*, 140 U. S. 278; *Cook* v. *Hart*, 146 U. S. 183; *Ex parte Frederich*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89, 95; *Pepke* v. *Cronan*, 155 U. S. 100; *In re Chapman*, 156 U. S. 211; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S. 101; *Fitts* v. *McGhee*, 172 U. S. 516; *Markuson* v. *Boucher*, 175 U. S. 184; *Minnesota* v. *Brundage*, 180 U. S. 499; *Urquhart* v. *Brown*, 205 U. S. 179; *Glasgow* v. *Moyer*, 225 U. S. 420; *Ex parte Spencer*, 228 U. S. 652; *Stevens* v. *McClaughry*, 207 Fed. Rep. 18; *Nolan* v. *State*, 53 Georgia, 136; *Nolan* v. *State*, 55 Georgia, 521; Georgia Laws, 1906, p. 24, Georgia Code, 1910, § 6506; *Lyons* v. *State*, 7 Ga. App. 50; Georgia Code, 1873, § 3719; Georgia Code, 1910, § 6089; *Lampkin* v. *State*, 87 Georgia, 517.

Judge Newman entirely misconceived the decisions which led to the denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *Allen* v. *Arguimbau*, 198 U. S. 149; *Garr, Scott & Co.* v. *Shannon*, 223 U. S. 458.

In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled

to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment. *Ex parte Badgley*, 7 Cowen, 472; *Medley, Petitioner*, 134 U. S. 160, 174; *In re Bonner*, 151 U. S. 256–259, 261, 262; *Ex parte Scott*, 70 Mississippi, 247; *People ex rel. Devoe* v. *Kelly*, 97 N. Y. 212; *Michaelson* v. *Beemer*, 72 Nebraska, 761.

Mr. Warren Grice and *Mr. Hugh M. Dorsey*, for appellee:

Appellant is asking this court to grant him a writ of *habeas corpus* which will virtually overturn his conviction in the state court without submitting to the United States courts important portions of the record on which the judgment is based, and on which he is being held.

The decision of the Supreme Court of Georgia holding that Frank had not adopted the correct procedure in invoking in the state court the effect of his absence when the verdict was received was not the passage of an *ex post facto* law but followed prior decisions.

Every question presented by the application for *habeas corpus* having already been presented by him to the state court and its decision invoked and its judgment rendered adverse to him, the principle of *res judicata* applies and for that reason alone the questions cannot be reopened here.

Where oral evidence is required to show want of jurisdiction, *habeas corpus* will not discharge the prisoner.

The writ of *habeas corpus* cannot be made use of to perform the functions of a writ of error.

Irregularities, no matter how gross, will not be sufficient to obtain a release on *habeas corpus*.

The due process clause in the Fourteenth Amendment does not overturn well settled principles and established usages prevailing in States, nor deprive the States of the

power to establish other systems of law and procedure, or alter the same at their will.

The Fourteenth Amendment does not require the presence of a defendant in court at the reception of a verdict as such presence does not go to the jurisdiction of the court.

Waivers such as were made in this case by the prisoner's counsel are binding on the prisoner.

Petitioner Frank cannot repudiate the acts of his counsel.

The Supreme Court of the United States will not grant the relief asked by Frank in this application in view of what has heretofore taken place in the Supreme Court of Georgia and by the Supreme Court of the United States in denying him a writ of error.

The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held Frank could not do directly.

The Supreme Court of Georgia had jurisdiction to determine whether Frank's counsel could waive his presence, and even if this court should think that ruling error, *habeas corpus* cannot correct it.

The action of the court in permitting Frank's counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly *habeas corpus* cannot avail to discharge the prisoner.

Numerous authorities support these propositions.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The points raised by the appellant may be reduced to the following:

(1) It is contended that the disorder in and about the court-room during the trial and up to and at the reception of the verdict amounted to mob domination, that not only

the jury but the presiding judge succumbed to it, and that this in effect wrought a dissolution of the court, so that the proceedings were *coram non judice.*

(2) That Frank's right to be present during the entire trial until and at the return of the verdict was an essential part of the right of trial by jury, which could not be waived either by himself or his counsel.

(3) That his presence was so essential to a proper hearing that the reception of the verdict in his absence, and in the absence of his counsel, without his consent or authority, was a departure from the due process of law guaranteed by the Fourteenth Amendment, sufficient to bring about a loss of jurisdiction of the trial court and to render the verdict and judgment absolute nullities.

(4) That the failure of Frank and his counsel, upon the first motion for a new trial, to allege as a ground of that motion the known fact of Frank's absence at the reception of the verdict, or to raise any jurisdictional question based upon it, did not deprive him of the right to afterwards attack the judgment as a nullity, as he did in the motion to set aside the verdict.

(5) And that the ground upon which the Supreme Court of Georgia rested its decision affirming the denial of the latter motion (83 S. E. Rep. 645),—viz., that the objection based upon Frank's absence when the verdict was rendered was available on the motion for new trial and under proper practice ought to have been then taken, and because not then taken could not be relied upon as a ground for setting aside the verdict as a nullity,—was itself in conflict with the Constitution of the United States because equivalent in effect to an *ex post facto* law, since, as is said, it departs from the practice settled by previous decisions of the same court.

In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of *habeas*

corpus under § 753, Rev. Stat. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. *Rogers* v. *Peck*, 199 U. S. 425, 434. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on *habeas corpus*. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error. *Ex parte Parks*, 93 U. S. 18, 21; *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Royall*, 117 U. S. 241, 250; *In re Frederich, Pet'r*, 149 U. S. 70, 75; *Baker* v. *Grice*, 169 U. S. 284, 290; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184.

As to the "due process of law" that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. *Walker* v. *Sauvinet*, 92 U. S. 90, 93; *Hurtado* v. *California*, 110 U. S. 516, 535; *Andrews* v. *Swartz*, 156 U. S. 272, 276; *Bergemann* v. *Backer*, 157 U. S. 655, 659; *Rogers* v. *Peck*, 199 U. S. 425, 434; *Drury* v. *Lewis*, 200 U. S. 1, 7; *Felts* v. *Murphy*, 201 U. S. 123, 129; *Howard* v. *Kentucky*, 200 U. S. 164.

It is, therefore, conceded by counsel for appellant that

in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of *habeas corpus* will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. And since no question is made respecting the original jurisdiction of the trial court, the contention is and must be that by the conditions that surrounded the trial, and the absence of defendant when the verdict was rendered, the court was deprived of jurisdiction to receive the verdict and pronounce the sentence.

But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the State of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston*, 153 U. S. 684, 687; *Andrews* v. *Swartz*, 156 U. S. 272, 275; *Rogers* v. *Peck*, 199 U. S. 425, 435; *Reetz* v. *Michigan*, 188 U. S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment.

In fact, such questions as are here presented under the due process clause of the Fourteenth Amendment, though sometimes discussed as if involving merely the jurisdiction of some court or other tribunal, in a larger and more ac-

curate sense involve the power and authority of the State itself. The prohibition is addressed to the State; if it be violated, it makes no difference in a court of the United States by what agency of the State this is done; so, if a violation be threatened by one agency of the State but prevented by another agency of higher authority, there is no violation by the State. It is for the State to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts. *Virginia* v. *Rives*, 100 U. S. 313, 318; *Civil Rights Cases*, 109 U. S. 3, 11; *McKane* v. *Durston*, 153 U. S. 684, 687; *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84; *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Carfer* v. *Caldwell*, 200 U. S. 293, 297; *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107; *In re Frederich, Petitioner*, 149 U. S. 70, 75; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *Baker* v. *Grice*, 169 U. S. 284, 291; *Minnesota* v. *Brundage*, 180 U. S. 499, 503; *Urquhart* v. *Brown*, 205 U. S. 179, 182.

It is, indeed, settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for *habeas corpus* is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the State not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error. *Ex parte Royall*, 117 U. S. 241, 251; *In re Frederich*,

Petitioner, 149 U. S. 70, 77; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *Baker* v. *Grice*, 169 U. S. 284, 291; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184; *Urquhart* v. *Brown*, 205 U. S. 179. And see *Henry* v. *Henkel*, 235 U. S. 219, 228. Such cases as *In re Loney*, 134 U. S. 372, 376; and *In re Neagle*, 135 U. S. 1; are recognized as exceptional.

It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte Royall*, 117 U. S. 241, 252—applying in a *habeas corpus* case what was said in *Covell* v. *Heyman*, 111 U. S. 176, 182, a case of conflict of jurisdiction:—"The forbearance which courts of coördinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." And see *In re Tyler, Petitioner*, 149 U. S. 164, 186.

It is objected by counsel for appellee that the alleged loss of jurisdiction cannot be shown by evidence outside of the record; that where a prisoner is held under a judg-

ment of conviction passed by a court having jurisdiction of the subject-matter, and the indictment against him states the case and is based upon a valid existing law, *habeas corpus* is not an available remedy, save for want of jurisdiction appearing upon the face of the record of the court wherein he was convicted. The rule at the common law, and under the act 31 Car. II, c. 2, and other acts of Parliament prior to that of July 1, 1816 (56 Geo. III, c. 100, § 3), seems to have been that a showing in the return to a writ of *habeas corpus* that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry. So it was held, under the judiciary act of 1789 (ch. 20, § 14, 1 Stat. 73, 81), in *Ex parte Watkins*, 3 Pet. 193, 202. And the rule seems to have been the same under the act of March 2, 1833 (ch. 57, § 7, 4 Stat. 632, 634), and that of Aug. 29, 1842 (ch. 257, 5 Stat. 539). But when Congress, in the act of February 5, 1867 (ch. 28, 14 Stat. 385), extended the writ of *habeas corpus* to all cases of persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States, procedural regulations were included, now found in Rev. Stat., §§ 754–761. These require that the application for the writ shall be made by complaint in writing signed by the applicant and verified by his oath, setting forth the facts concerning his detention, in whose custody he is detained, and by virtue of what claim or authority, if known; require that the return shall certify the true cause of the detention; and provide that the prisoner may under oath deny any of the facts set forth in the return or allege other material facts, and that the court shall proceed in a summary way to determine the facts by hearing testimony and arguments, and thereupon dispose of the party as law and justice require. The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the

act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him. *Cuddy, Petitioner*, 131 U. S. 280, 283, 286; *In re Mayfield*, 141 U. S. 107, 116; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242; *In re Watts and Sachs*, 190 U. S. 1, 35.

In the light, then, of these established rules and principles: that the due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a State on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the State, and

not merely a single step in those proceedings; and that it is incumbent upon the prisoner to set forth in his application a sworn statement of the facts concerning his detention and by virtue of what claim or authority he is detained; we proceed to consider the questions presented.

1. And first, the question of the disorder and hostile sentiment that are said to have influenced the trial court and jury to an extent amounting to mob domination.

The District Court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. There is no doubt of the jurisdiction to issue the writ of *habeas corpus*. The question is as to the propriety of issuing it in the present case. Under § 755, Rev. Stat., it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it. And see *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 2, 110; *Ex parte Terry*, 128 U. S. 289, 301.

Now the obligation resting upon us, as upon the District Court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it. Thus, the petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his

life without due process of law. Dealing with the narrative, then, in its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the Supreme Court of the State, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, successively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the State and which, for reasons not explained, he has not included in the petition. As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant and therefore insufficient in law to avoid the verdict. 141 Georgia, 243, 280. And it was because the defendant was concluded by that finding that the Supreme Court upon the subsequent motion to set aside the verdict declined to again consider those allegations. 83 S. E. Rep. 645, 655.

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice

and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in *habeas corpus* cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see *Ex parte Terry*, 128 U. S. 289, 305, 310; *Ex parte Columbia George*, 144 Fed. Rep. 985, 986.

However, it is not necessary, for the purposes of the present case, to invoke the doctrine of *res adjudicata*, and, in view of the impropriety of limiting in the least degree the authority of the courts of the United States in investigating an alleged violation by a State of the due process of law guaranteed by the Fourteenth Amendment, we put out of view for the present the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort.

But this does not mean that that decision may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the State, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to

be heard according to the usual course of law in such cases.

We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. *Myers* v. *State*, 97 Georgia 76 (5), 99; *Collier* v. *State*, 115 Georgia, 803.

Such an appeal was accorded to the prisoner in the present case [*Frank* v. *State*, 141 Georgia, 243 (16), 280], in a manner and under circumstances already stated, and the Supreme Court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the States and the Federal Government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial

through disorder and manifestations of hostile sentiment cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the Supreme Court. This, we think, embodies more than one error of reasoning. It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court; which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter, instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the State before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed judgment upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated.

The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the "due process of law" provision of the Fourteenth Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the State, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the States to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle but is in conflict with the practice that prevails in all of the States, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court or as rendering the proceedings *coram non judice*, in any such sense as to bar further proceedings. In *Myers* v. *State*, 97 Georgia, 76, (5), 99; *Collier* v. *State*, 115 Georgia, 803; *Sanders* v. *State*, 85 Indiana, 318; *S. C.*, 44 Am. Rep. 29; *Massey* v. *State*, 31 Tex. Cr. Rep. 371, 381; *S. C.*, 20 S. W. Rep. 758; and *State* v. *Weldon*, 91 S. Car. 29, 38; *S. C.*, 39 L. R. A., N. S., 667, 669;—in all of which it was held that the prisoner's right to a fair trial had been interfered with by disorder or mob violence—it was not held that jurisdiction over the prisoner had been lost; on the contrary, in each instance a new trial was

awarded as the appropriate remedy. So, in the cases where the trial judge abdicated his proper functions or absented himself during the trial (*Hayes* v. *State*, 58 Georgia, 36 (12), 49; *Blend* v. *People*, 41 N. Y. 604; *Shaw* v. *People*, 3 Hun, 272; aff'd 63 N. Y. 36; *Hinman* v. *People*, 13 Hun, 266; *McClure* v. *State*, 77 Indiana, 287; *O'Brien* v. *People*, 17 Colorado, 561; *Ellerbe* v. *State*, 75 Mississippi, 522; *S. C.*, 41 L. R. A. 569) the reviewing of the State in each instance simply set aside the verdict and awarded a new trial.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law.

2. We come, next, to consider the effect to be given to the fact, admitted for present purposes, that Frank was not present in the court-room when the verdict was rendered, his presence having been waived by his counsel, but without his knowledge or consent. No question is made but that at the common law and under the Georgia decisions it is the right of the prisoner to be present throughout the entire trial, from the commencement of the selection of the jury until the verdict is rendered and jury discharged. *Wade* v. *State*, 12 Georgia, 25, 29; *Martin* v. *State*, 51 Georgia, 567; *Nolan* v. *State*, 53 Georgia, 137; *S. C.*, 55 Georgia, 521; *Smith* v. *State*, 59 Georgia, 513; *Bonner* v. *State*, 67 Georgia, 510; *Barton* v. *State*, 67 Georgia, 653; *Cawthon* v. *State*, 119 Georgia, 395, 412; *Bagwell* v. *State*, 129 Georgia, 170; *Lyons* v. *State*, 7 Ga. App. 50. But the effect of these decisions is that the prisoner may personally waive the right to be present when the verdict is rendered, and perhaps may waive it by authorized act of his counsel; and that where, without his consent, the verdict is received in his absence, he may

treat this as an error, and by timely motion demand a new trial, or (it seems) he may elect to treat the verdict as a nullity by moving in due season to set it aside as such. But we are unable to find that the courts of Georgia have in any case held that, by receiving a verdict in the absence of the prisoner and without his consent, the jurisdiction of the trial court was terminated. In the *Nolan Case, supra*, the verdict was set aside as void on the ground of the absence of the prisoner; but this was not held to deprive the trial court of its jurisdiction. On the contrary, the jurisdiction was treated as remaining, and that court proceeded to exercise it by arraigning the prisoner a second time upon the same indictment, when he pleaded specially, claiming his discharge because of former jeopardy; the trial court overruled this plea, the defendant excepted, and the jury found the defendant guilty; and, upon review, the Supreme Court reversed this judgment, not for the want of jurisdiction in the trial court, but for error committed in the exercise of jurisdiction. To the same effect is *Bagwell* v. *State, supra.*

In most of the other States, where error is committed by receiving a verdict of guilty during the involuntary absence of the accused, it is treated as merely requiring a new trial. In a few cases, the appellate court has ordered the defendant to be discharged, upon the ground that he had been once in jeopardy and a new trial would be futile.

However, the Georgia Supreme Court in the present case (83 S. E. Rep. 645) held, as pointed out in the prefatory statement, that because Frank, shortly after the verdict, was made fully aware of the facts, and he then made a motion for a new trial upon over 100 grounds, without including this as one, and had the motion heard by both the trial court and the Supreme Court, he could not, after this motion had been finally adjudicated against him, move to set aside the verdict as a nullity because of his absence when the verdict was rendered. There is

nothing in the Fourteenth Amendment to prevent a State from adopting and enforcing so reasonable a regulation of procedure. *Dreyer* v. *Illinois*, 187 U. S. 71, 77–80.

It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the Amendment, in that it took from him at a critical stage of the proceeding the right or opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the "due process" clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (*Hurtado* v. *California*, 110 U. S. 516, 532, 538; *Lem Woon* v. *Oregon*, 229 U. S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (*Walker* v. *Sauvinet*, 92 U. S. 90), or in criminal (*Hallinger* v. *Davis*, 146 U. S. 314, 324; *Maxwell* v. *Dow*, 176 U. S. 581, 594, 602, 604).

It is argued that a State may not, while providing for trial by jury, permit the accused to waive the right to be heard in the mode characteristic of such trial, including the presence of the prisoner up to and at the time of the rendition of the verdict. But the cases cited do not support this contention. In *Hopt* v. *Utah*, 110 U. S. 574, 578 (principally relied upon), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If "the indictment is for a felony, the defendant *must be* personally present at the trial." The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of

this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirement as to his personal presence was denied on the ground that his life could not be lawfully taken except in the mode prescribed by law. No other question was involved. See *Diaz* v. *United States*, 223 U. S. 442, 455, 458.

The distinction between what the common law requires with respect to trial by jury in criminal cases, and what the States may enact without contravening the "due process" clause of the Fourteenth Amendment, is very clearly evidenced by *Hallinger* v. *Davis*, 146 U. S. 314, and *Lewis* v. *United States*, 146 U. S. 370, which were under consideration by the court at the same time, both opinions being written by Mr. Justice Shiras. In the *Lewis Case*, which was a conviction of murder in a Circuit Court of the United States, the trial practice being regulated by the common law, it was held to be a leading principle, pervading the entire law of criminal procedure, that after indictment nothing should be done in the absence of the prisoner; that the making of challenges is an essential part of the trial, and it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time the challenges were made; and that in the absence of a statute, this right as it existed at common law must not be abridged. But in the *Hallinger Case*, where a State by legislative enactment had permitted one charged with a capital offense to waive a trial by jury and elect to be tried by the court, it was held that this method of procedure did not conflict with the Fourteenth Amendment. So in *Howard* v. *Kentucky*, 200 U. S. 164, 175—a case closely in point upon the question now presented—this court, finding that by the law of the State an occasional absence of the accused from the trial, from which no injury resulted to his substantial rights, was not deemed material error, held that the application of this rule of law did not

amount to a denial of due process within the meaning of the Fourteenth Amendment.

In fact, this court has sustained the States in establishing a great variety of departures from the common law procedure respecting jury trials. Thus, in *Brown* v. *New Jersey*, 175 U. S. 172, 176; a statute providing for the trial of murder cases by struck jury was sustained, notwithstanding it did not provide for twenty peremptory challenges. *Simon* v. *Craft*, 182 U. S. 427, 435, while not a criminal case, involved the property of a person alleged to be of unsound mind, and it was held that an Alabama statute, under which the sheriff determined that Mrs. Simon's health and safety would be endangered by her presence at the trial of the question of her sanity, so that while served with notice she was detained in custody and not allowed to be present at the hearing of the inquisition, did not deprive her of property without due process of law. In *Felts* v. *Murphy*, 201 U. S. 123, 129, where the prisoner was convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence given upon the trial because of his almost total deafness, his inability to hear being such that it required a person to speak through an ear-trumpet close to his ear in order that such person should be heard by him, and the trial court having failed to see to it that the testimony in the case was repeated to him through his ear-trumpet, this court said that this was "at most an error, which did not take away from the court its jurisdiction over the subject-matter and over the person of the accused." In *Twining* v. *New Jersey*, 211 U. S. 78, 101, 111, it was held that the exemption of a prisoner from compulsory self-incrimination in the state courts was not included in the guaranty of due process of law contained in the Fourteenth Amendment. In *Jordan* v. *Massachusetts*, 225 U. S. 167, 177, where one of the jurors was subject to reasonable doubt as to his

sanity, and the state court, pursuant to the local law of criminal procedure, determined upon a mere preponderance of the evidence that he was sane, the conviction was affirmed. In *Garland* v. *Washington*, 232 U. S. 642, 645, it was held that the want of a formal arraignment, treated by the State as depriving the accused of no substantial right and as having been waived and thereby lost, did not amount to depriving defendant of his liberty without due process of law.

Our conclusion upon this branch of the case is, that the practice established in the criminal courts of Georgia: that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for new trial upon other grounds alone, when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making that motion; is a regulation of criminal procedure that it is within the authority of the State to adopt. In adopting it, the State declares in effect, as it reasonably may declare, that the right of the accused to be present at the reception of the verdict is but an incident of the right of trial by jury; and since the State may, without infringing the Fourteenth Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial. The presence of the prisoner when the verdict is rendered is not so essential a part of the hearing that a rule of practice permitting the accused to waive it and holding him bound by the waiver amounts to a deprivation of "due process of law."

3. The insistence that the decision of the Supreme Court of Georgia in affirming the denial of the motion to set aside the verdict (83 S. E. Rep. 645) on the ground that Frank's failure to raise the objection upon the motion for a new trial amounted to a waiver of it, was inconsistent with the previous practice as established in *Nolan* v.

State, 53 Georgia, 137; *S. C.*, 55 Georgia, 521; and therefore amounted in effect to an *ex post facto* law in contravention of § 10 of Article I of the Federal Constitution, needs but a word. Assuming the inconsistency, it is sufficient to say that the constitutional prohibition: "No State shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts. *Calder* v. *Bull*, 3 Dall. 386, 389; *Fletcher* v. *Peck*, 6 Cr. 87, 138; *Kring* v. *Missouri*, 107 U. S. 221, 227; *Thompson* v. *Utah*, 170 U. S. 343, 351; *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, 638; *Ross* v. *Oregon*, 227 U. S. 150, 161.

4. To conclude: Taking appellant's petition as a whole, and not regarding any particular portion of it to the exclusion of the rest—dealing with its true and substantial meaning and not merely with its superficial import—it shows that Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the State; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that State, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court-room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury

rendered its verdict, has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts. In all of these proceedings the State, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to the established modes of procedure, and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty. In our opinion, he is not shown to have been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under "due process of law" within the meaning of the Constitution.

The final order of the District Court, refusing the application for a writ of *habeas corpus*, is

Affirmed.

MR. JUSTICE HOLMES with whom concurred MR. JUSTICE HUGHES, dissenting.

Mr. Justice Hughes and I are of opinion that the judgment should be reversed. The only question before us is whether the petition shows on its face that the writ of *habeas corpus* should be denied, or whether the District Court should have proceeded to try the facts. The allegations that appear to us material are these. The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in that city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending

danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and claping of hands, and the judge before beginning his charge had a private conversation with the petitioner's counsel in which he expressed the opinion that there would be 'probable danger of violence' if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that the petitioner and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on until order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

We lay on one side the question whether the petitioner could or did waive his right to be present at the polling of the jury. That question was apparent in the form of the trial and was raised by the application for a writ of error; and although after the application to the full Court we thought that the writ ought to be granted, we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States. But *habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

The argument for the appellee in substance is that the trial was in a court of competent jurisdiction, that it retains jurisdiction although, in fact, it may be dominated by a mob, and that the rulings of the state court as to the fact of such domination cannot be reviewed. But the argument seems to us inconclusive. Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. The loss of jurisdiction is not general but particular, and proceeds from the control of a hostile influence.

When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter *res judicata*. The State acts when by its agency it finds the prisoner guilty and condemns him. We have held in a civil case that it is no defence to the assertion of the Federal right in the Federal court that the State has corrective procedure of its own—that still less does such procedure draw to itself the final determination of the Federal question. *Simon* v. *Southern Ry.*, 236 U. S. 115, 122, 123. We see no reason for a less liberal rule in a matter of life and death. When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. *Kansas Southern Ry.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 591. *Nor. & West. Ry.* v. *Conley*,

March 8, 1915, 236 U. S. 605. Otherwise, the right will be a barren one. It is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for *habeas corpus* to override the findings of fact by the state courts. It would indeed be a most serious thing if this Court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution. If, however, the argument stops short of this, the whole structure built upon the state procedure and decisions falls to the ground.

To put an extreme case and show what we mean, if the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this Court would allow itself to be silenced by the suggestion that the record showed no flaw. To go one step further, suppose that the trial had taken place under such intimidation and that the Supreme Court of the State on writ of error had discovered no error in the record, we still imagine that this court would find a sufficient one outside of the record, and that it would not be disturbed in its conclusion by anything that the Supreme Court of the State might have said. We therefore lay the suggestion that the Supreme Court of the State has disposed of the present question by its judgment on one side along with the question of the appellant's right to be present. If the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. And notwithstanding the principle of comity and convenience (for in our opinion it is nothing more, *United States* v. *Sing Tuck*, 194 U. S. 161, 168), that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of *habeas corpus*, when, as here, that resort has been had in vain, the power to secure fundamental rights

that had existed at every stage becomes a duty and must be put forth.

The single question in our minds is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result, is shown on its face unwarranted, by the specifications, which may be presumed to set forth the strongest indications of the fact at the petitioner's command. This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob. Of course we are speaking only of the case made by the petition, and whether it ought to be heard. Upon allegations of this gravity in our opinion it ought to be heard, whatever the decision of the state court may have been, and it did not need to set forth contradictory evidence, or matter of rebuttal, or to explain why the motions for a new trial and to set aside the verdict were overruled by the state court. There is no reason to fear an impairment of the authority of the State to punish the guilty. We do not think it impracticable in any part of this country to have trials free from outside control. But to maintain this immunity it may be necessary that the supremacy of the law and of the Federal Constitution should be vindicated in a case like this. It may be that on a hearing a different complexion would be given to the judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are

of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death.